

No. 10378

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol 2378
*Exhibits in Custody
of Clerk.*

MONTGOMERY WARD AND COMPANY,
a corporation,

Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA
LAMBERSON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

FILED

MAR 30 1943

PAUL F. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Pocatello, Idaho

WILLIAM S. HOLDEN

Idaho Falls, Idaho

Attorneys for Appellees. [2*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States,
In and for the District of Idaho,
Eastern Division

No. 1183

CHESTER A. LAMBERSON and LYDIA LAM-
BERSON,

Plaintiffs,

vs.

MONTGOMERY WARD and COMPANY, a cor-
poration,

Defendant.

COMPLAINT

Plaintiffs for cause of action against the defend-
ant, complain and allege:

I.

That at all the times hereinafter mentioned the
plaintiffs were, and still are, husband and wife and
are citizens and residents of the District and State
of Idaho.

II.

That at all the times hereinafter mentioned the
defendant was and still is a corporation duly or-
ganized and existing under the laws of the State of
Illinois, and is authorized to transact and carry on
business in the State of Idaho, by having complied
with the laws of the State of Idaho with respect to
foreign corporations doing business therein.

III.

That the defendant is a citizen and resident of the State of Illinois and the jurisdiction of this Court depends upon diversity of citizenship of the parties plaintiff and defendant. That the plaintiffs are citizens and residents of the State of Idaho, while the defendant is a citizen and resident of the State of Illinois.

IV.

That the matter in dispute herein is in excess of Three Thousand (\$3000.00) Dollars, exclusive of interest and costs, to-wit, the sum of Twenty-five Thousand One Hundred Ninety-five (\$25,195.00) Dollars.

V.

That the defendant maintains many stores and mercan- [3] tile establishments throughout the United States and in the State of Idaho, and among others maintains one such establishment on Shoup Avenue in the City of Idaho Falls, Idaho; said store on Shoup Avenue in said City of Idaho Falls, faces the west.

VI.

That the defendant invites the public generally to visit and enter said stores and trade therein and buy merchandise from the defendant in its said establishments, stores or branches of business and the defendant invited the public to enter and trade at its store on Shoup Avenue in the City of Idaho Falls, Idaho, and did invite this plaintiff, Lydia Lamberson, to enter therein as a customer to buy

merchandise of and from the defendant and to trade with said defendant.

VII.

That on the 26th day of November, 1941, at Three Thirty o'clock in the afternoon of said day, the plaintiff, Lydia Lamberson, entered the place of business of the defendant on Shoup Avenue in the City of Idaho Falls, Idaho, for the purpose of purchasing merchandise.

VIII.

That defendant's said store on Shoup Avenue in Idaho Falls, Idaho, had four doors all of which face the west on Shoup Avenue, and the plaintiff, Lydia Lamberson, entered said store through the third door from the south.

IX.

That after being in said store for sometime shopping, the plaintiff, Lydia Lamberson, attempted to leave and depart through the same door which she entered; said third door from the south and the one through which plaintiff, Lydia Lamberson, entered and departed, sloped up to the east from the sidewalk for a distance of approximately seven feet and the floor of the entrance to said door is hard tile and becomes very slick and slippery when wet, which is under the exclusive control of defendant. [4]

X.

That at the time the plaintiff, Lydia Lamberson, entered said store of the defendant, through said

third door from the south, said entrance from the sidewalk to the door, and the tile part hereinbefore mentioned, was dry and was not slippery. That during the time that the said plaintiff, Lydia Lamberson, was in said store of the defendant, said defendant, through and by its agents, servants and employees, acting in the line, course and scope of their employment, cast or threw considerable water upon said tile between the sidewalk and the said store door and wet the same and that by reason thereof the same was extremely slick and slippery; whereupon, the plaintiff, Lydia Lamberson, attempted to depart through said third door from the south and upon approaching said sloping tile, by reason of the same being wet the plaintiff's, Lydia Lamberson's, feet slipped out from under her and she fell with great force and violence and did then and there break her wrist and that by reason of said break, said wrist is deformed and that she is permanently injured.

XI.

That she was otherwise injured, damaged and bruised and rendered sick, sore and lame and was unable to sleep at night and has suffered great and extreme pain and anguish ever since receiving said injury, still suffers therefrom and will continue to suffer therefrom so long as she may live.

XII.

That the defendant was negligent, careless and heedless in the following particulars, to-wit: In maintaining, allowing and permitting said tile be-

tween said door and sidewalk to be in a wet, slippery, slick and dangerous condition, well knowing that customers were required to and did pass over the same and particularly knowing that the plaintiff, Lydia Lamberson, would pass over the same in leaving said store and were negligent, careless and heedless in that the defendant, through and by its agents, servants and employees, cast and threw large quantities of water on said tile and allowing same to remain there and rendering the same [5] a trap or snare, dangerous to anyone attempting to enter or depart from said store.

XIII.

That the defendant was negligent, careless and heedless through and by its agents, servants or employees in not showing the plaintiff, Lydia Lamberson, of the dangerous condition of said tile, to the end that the plaintiff, Lydia Lamberson, could have taken precaution thus avoiding said injury or used another door and under a safer condition.

XIV.

That the defendant, through and by its agents, servants and employees were negligent, careless and heedless, in not throwing ashes, or sand, or some other substance upon said *tile* to render the same safe for persons to pass thereover, and particularly with respect to the plaintiff, Lydia Lamberson.

XV.

That the defendant was negligent in not *mopping*

the water from said tile and thereby leaving said snare or trap for the defendant's customers to pass thereover.

XVI.

That the plaintiffs, in an effort to effect a cure for the extreme, excruciating and painful injuries of Lydia Lamberson, sustained as aforesaid, were forced and did employ a physician and surgeon and did incur liability for treatment to said injuries in the sum of Forty-five (\$45.00) Dollars, and that said sum of Forty-five (\$45.00) Dollars is reasonable for the services rendered by said physician and surgeon.

XVII.

That the plaintiff, Lydia Lamberson, was regularly employed at the time of receiving said injuries as a cosmetic saleswoman and was earning a good commission, or income, of, to-wit, Sixty (\$60.00) Dollars per month and that by reason of said injury, the plaintiff, Lydia Lamberson, was unable to follow her employment for a period of three months and lost by reason of said injury the sum of One Hundred Fifty (\$150.00) Dollars in earnings. [6]

XVIII.

That all of the damages and injuries sustained, as aforesaid, by the plaintiffs was proximately caused by the negligence, carelessness and heedlessness of the defendant, its agents, servants and employees while acting in the line, course and scope of their employment, as herein set forth.

XVIX.

That by reason of the premises, the plaintiffs suffered general damages in the sum of \$25,000.00, and special damages as herein set forth in the sum of \$195.00.

Wherefore, plaintiffs pray judgment against the defendant for the sum of \$25,000.00 general damages, and \$195.00 special damages, for costs of suit and general relief.

CLYDE BOWEN

WALTER H. ANDERSON

Attorneys for Plaintiffs

Residence and P. O. Address

Pocatello, Idaho

WILLIAM S. HOLDEN

Attorney for Plaintiffs

Residence and P. O. Address

Idaho Falls, Idaho

State of Idaho

County of Bonneville—ss.

Lydia Lamberson, being first duly sworn, deposes and says: That she is one of the plaintiffs in the above and foregoing Complaint and she knows the allegations therein contained and the same are true as she verily believes and that she makes this verification on behalf of herself and co-plaintiff husband, Chester A. Lamberson.

LYDIA LAMBERSON

Subscribed and sworn to before me this 2nd day of June, A. D. 1942.

[Seal]

WILLIAM S. HOLDEN

Notary Public

For the State of Idaho

Residing at Idaho Falls, Idaho

My commission expires June 6, 1945.

[Endorsed]: Filed June 4, 1942. [7]

[Title of Court and Cause.]

MOTIONS AND NOTICE

Comes now the defendant, Montgomery Ward and Company, a corporation, and moves the court as follows:

First: To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

Second: Defendant moves the court for an order requiring plaintiffs to make a more definite statement of their alleged cause of action for the following reasons: That said complaint is uncertain and indefinite in the following particulars:

(a) That it cannot be determined therefrom whether the slope of the tile entryway from the sidewalk to the door described in said complaint, contributed to the alleged fall of the plaintiff, Lydia Lamberson, or whether the alleged fall of the said plaintiff was caused only by the alleged presence of water on said tiling.

(b) That, whereas, the complaint alleges spe-

cifically that said plaintiff “fell with great force and violence and did then and there break her wrist”, said allegation is indefinite and uncertain in that it cannot be determined therefrom which wrist was broken and it cannot be determined what kind of fracture, if any, was sustained by said plaintiff. Neither can it be determined from the said complaint which bone or bones of the arm involved were broken and the kind or classification of the fracture alleged to have occurred.

(c) That it cannot be determined from the said complaint whether said plaintiff was a right handed or left handed person.

(d) That, whereas, the complaint alleges in paragraph XI thereof “that she was otherwise injured, damaged and bruised and rendered sick, sore and lame”, it cannot be determined where on her body or how she was injured otherwise than by the alleged fracture of the said wrist.

(e) That it cannot be determined from the said complaint whether “the wrist” described in the complaint refers to a certain [8] bone or bones in either one of the arms.

(f) That it cannot be determined from said pleading whether the reduction of the alleged fracture of some bone or bones unnamed was successful from a medical or surgical standpoint.

Third: The defendant further moves the court to make and enter an order herein requiring the plaintiffs to prepare and furnish to defendant a Bill of Particulars covering the matters and things hereinafter specified so as to enable the defendant

properly to prepare its answer and to prepare for trial, to wit:

(a) Showing whether plaintiff, Lydia Lamberson, was a right handed or left handed person at the date of the alleged accident.

(b) Whether the metacarpus or carpus or other bone or bones were fractured and the specific kind of fracture alleged to have been sustained.

(c) Which arm, right or left, was involved in the alleged fracture.

(d) The age of the plaintiff, Lydia Lamberson.

Fourth: The defendant further moves the court to make and enter an order herein directing the said plaintiff, Lydia Lamberson, to present herself to Dr. C. M. Cline, First Security Bank Building, corner of Park Avenue and A Street, on the second floor thereof, in Idaho Falls, Bonneville County, State of Idaho, the place of the residence of the said plaintiffs, for the purpose of submitting to a physical examination by the said Dr. C. M. Cline as the representative of the defendant; and that said order provide that said physical examination be made by said Dr. C. M. Cline, on, to wit, Wednesday, July 1st, 1942, at the hour of 3 o'clock P. M. of said day at said office, or such other time and place as to the court may seem meet and proper and as may be convenient to the said plaintiff.

OTTO E. McCUTCHEON

Attorney for the Defendant.

Residence and P. O. Address:

208 Salisbury Building, Idaho Falls, Idaho.

NOTICE OF MOTION

To Messrs. William S. Holden, American National Bank Building, Idaho Falls, Idaho, Clyde Bowen, First Security Bank Building, Pocatello, Idaho, Walter H. Anderson, 209 Pioneer Building, Pocatello, Idaho, attorneys for the plaintiffs, and to Chester A. Lamberson and Lydia Lamberson, of Idaho Falls, Idaho, plaintiffs:

You and each of you will please take notice that the undersigned will bring the above motions on for hearing before this court in the Federal Building at Pocatello, Idaho, on the first day of the next term of said court in said district and division, to wit, on the 12th day of October, 1942, at the hour of 11 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard; or at such other time or place as the counsel and court find convenient and as may be ordered by the court.

OTTO E. McCUTCHEON

Attorney for the Defendant.

Residence and P. O. Address:

208 Salisbury Building,

Idaho Falls, Idaho.

(Service Accepted.)

[Endorsed]: Filed June 15, 1942. [10]

[Title of Court and Cause.]

NOTICE

The defendant, Montgomery Ward and Company, a corporation, and its counsel, Otto E. McCutcheon, Esq., will please take notice that the motions heretofore served in this action will be called upon brief at Boise, Idaho pursuant to rule No. 18 of the Rules of Practice of the United States District Court for the District of Idaho, adopted September 19, 1938.

You will please govern yourselves accordingly.

Dated at Pocatello, Idaho, this 13th day of June, A. D. 1942.

CLYDE BOWEN

Pocatello, Idaho

WALTER H. ANDERSON

Pocatello, Idaho

WILLIAM S. HOLDEN

Idaho Falls, Idaho

(Service Accepted.)

[Endorsed]: Filed June 22, 1942. [11]

[Title of Court and Cause.]

ORDER RULING ON MOTIONS

The defendant has presented four different motions for consideration effecting the alleged cause of action of the plaintiffs:

First; its motion to dismiss appears to have been withdrawn by the defendant from further consideration.

Second; its motion requiring the plaintiffs to make a more definite statement in their complaint, and

Third; the request to furnish bill of particulars may be considered together, and it is sufficient to say that the motion to make a more definite statement in the complaint relating to the request therein specified should be denied, excepting that the request in (c) as to which arm, the right or left, "was involved in said fracture" and what other part of the body of the plaintiff was injured, if any, should be granted under the motion for bill of particulars.

Fourth; it appears from the brief of the plaintiff filed on the motion, that the plaintiff has consented to submit herself to a physical examination by a licensed physician, and therefore it will be unnecessary to rule thereof, and It Is So Ordered,

Dated July 7, 1942.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed July 7, 1942. [12]

[Title of Court and Cause.]

BILL OF PARTICULARS

To the Defendant and its Counsel, Otto E. McCutcheon, Esq.:

You are hereby notified that agreeably to the order of the Court heretofore made and entered on

the 7th day of July, 1942, the plaintiffs furnish you with the following bill of particulars:

That the plaintiff Lydia Lamberson's injuries caused by the fall mentioned in the plaintiff's complaint were as follows:

Her right wrist was broken; her back was sprained and injured which causes her severe pain from time to time yet and has ever since receiving said injury; that she injured her right ankle by spraining and bruising the same and said ankle is still discolored and pains her quite often up to this time.

Dated this 16th day of July, 1942.

WILLIAM S. HOLDEN

Res. Idaho Falls, Idaho

CLYDE BOWEN

Res. Pocatello, Idaho

WM. H. WITTY

Res. Pocatello, Idaho

WALTER H. ANDERSON

Res. Pocatello, Idaho

(Service Accepted.)

[Endorsed]: Filed July 20, 1942. [13]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME
TO ANSWER

It is hereby stipulated and agreed by and between the respective parties through their respective at-

torneys of record that the defendant may have to and including the 12th day of August, 1942, to file and serve its answer in the above entitled action.

Dated July 22nd, 1942.

WILLIAM S. HOLDEN

Attorneys for the Plaintiffs.

OTTO E. McCUTCHEON

Attorney for the Defendant.

[Endorsed]: Filed July 23, 1942. [14]

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Montgomery Ward and Company, a corporation, and for its answer to the complaint of the plaintiffs on file in said Court and said cause, admits, denies and alleges as follows:

FIRST DEFENSE

Admits the allegation set forth in Paragraphs numbered I, II, III, V, VI, VII and VIII of the said complaint, but, nevertheless, alleges that the said complaint fails to state a claim against the defendant upon which any relief can be granted.

SECOND DEFENSE

As to paragraphs numbered IV, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII and XIX of the said complaint the defendant denies generally and specifically each and all of the allegations set forth

in each and all of the said numbered paragraphs except those allegations thereof which are hereinafter specifically admitted or admitted by a statement of fact.

THIRD DEFENSE

As a third separate and distinct defense defendant alleges: That the tile floor in the entrances to said store, including the one alleged to have been used by the plaintiff, Lydia Lamberson, on entering and leaving said store, was at said time and place constructed of small blocks of encaustic tile the exposed faces or surfaces of which were and are approximately one inch square, set together and bound by cement, and that said floor or space was and is rough or roughened so as to prevent the same from becoming slick or slippery whether the same be wet or dry; that the slope of said floor or surface from the threshold of the door was and is approximately one inch in seven feet or, one seventh of one inch per foot of distance from the said door to the edge of the public sidewalk then and there existing on the easterly side of said Shoup Avenue which was and is the westerly front of said building; that defendant was not and is [15] not the owner of said property but rented and rents it from one B. M. Rogers of Idaho Falls, Idaho, the owner thereof.

That the said tile was dry at the time said plaintiff entered the store and remained dry until after she had left the building, and said tile was in such

condition at the time said plaintiff left the store that it was impossible for her to have slipped thereon; that at said time and place said entryway presented a safe and secure path and footing for the use of said plaintiff and defendant's customers using said entryway for ingress and egress to and from said store; that no act or omission of defendant or any of its employees or agents made, or in any way contributed to making, said entryway unsafe for said plaintiff or any other customer.

FOURTH DEFENSE

As a fourth, separate and distinct defense, the defendant alleges:

1

That whatever damages, if any, sustained by the plaintiffs and particularly the plaintiff, Lydia Lamberson, were directly contributed to and proximately caused by the negligence, carelessness, and heedlessness of the said Lydia Lamberson in failing to observe and heed where she was walking and the conditions prevailing and observable in her path from the store to the sidewalk and under foot.

FIFTH DEFENSE

1

As a fifth, separate and distinct defense thereto, the defendant alleges:

That it is informed and believes and on such information and belief it alleges that the plaintiff, Lydia Lamberson, did not slip on said tile, floor or

walk in said entrance to defendant's store, either as alleged or otherwise or at all; the defendant alleges that the fall, if any, sustained by the said plaintiff on her leaving said building, was proximately caused by an arthritic condition of her ankles and knees existing at that time and previously; and that due to said arthritic condition she, the said Lydia Lamberson, suffered and sustained a turning or giving away of her ankle or ankles whereupon she dropped to the floor or tile; that said plaintiff's arthritic condition had frequently caused her to fall previously to on or about November 26th, 1941, at various and sundry times and places; and on said 26th day of November, 1941, plaintiffs well knew of the said arthritic condition and the tendency of her ankles to turn causing her to fall, but, nevertheless, she heedlessly, carelessly and negligently, at said time and place did nothing to support herself by the use of any appropriate aid required by her on account of said arthritic condition of the joints of her legs.

Wherefore, having fully answered, defendant prays that the plaintiffs either jointly or severally take nothing by their said complaint and that judgment of dismissal be made and entered herein, and for costs of suit and general relief.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and P. O. Address:
Idaho Falls, Idaho.

(Duly verified.)

To the Honorable Court, the attorneys for the plaintiffs, and the plaintiffs:

Please take notice that defendant demands trial of said cause before the court sitting without a jury.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and P. O. Address:

Idaho Falls, Idaho.

(Service accepted.)

[Endorsed]: Filed August 11, 1942. [17]

[Title of Court and Cause.]

OPINION

William S. Holden,

Idaho Falls, Idaho.

Walter H. Anderson,

Pocatello, Idaho.

Clyde Bowen,

Pocatello, Idaho.

Attorneys for the Plaintiffs.

Otto E. McCutcheon,

Idaho Falls, Idaho.

Attorney for the Defendant.

October 20, 1942.

Healy, Circuit Judge (Presiding)

It was shown by a preponderance of the testimony that at the time of the accident there was water on the ramp leading from defendant's store, and

that the presence of the water was the proximate cause of Mrs. Lamberson's slipping and falling. It is not disputed that as a result of the fall both bones of her right forearm were fractured close to the wrist. There is no sufficient evidence of contributory negligence.

Judgment will therefore be for the plaintiffs. The injury has resulted in some permanent disability. General damages are assessed in the sum of Seventeen hundred fifty dollars and special damages in the sum of \$195.00.

Counsel for plaintiffs will prepare and submit findings, conclusions of law and judgment.

WILLIAM HEALY

Circuit Judge, acting as

District Judge.

[Endorsed]: Filed October 20, 1942. [18]

[Title of Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above case came on regularly for trial before the court without the intervention of a jury. And the court having reached its decision announces its findings of fact and conclusions of law as follows:

I.

That the plaintiffs were at all times herein mentioned and still are husband and wife and citizens and residents of the State and District of Idaho.

II.

That the defendant was at all times herein mentioned and still is a corporation duly organized and existing under the laws of the State of Illinois, and is duly authorized to do and transact business in the State of Idaho.

III.

That the necessary diversity of citizenship exists herein to give this court jurisdiction, in that the plaintiffs are citizens and residents of the State of Idaho, and the defendant is a citizen and resident of the State of Illinois. And the amount in controversy at the time the action was filed was sufficient to give this court jurisdiction.

IV.

That the defendant maintains stores at various cities and *town* throughout the United States, and one of which defendant's stores is located at Idaho Falls, Bonneville County, Idaho.

V.

That the defendant in the maintenance of such stores invites the public to enter and patronize the same.

VI.

That on the 26th day of November in 1941, the plaintiff, Lydia Lamberson, entered the place of business or the store of the defendant located in Idaho Falls, Idaho, and at the time of her entrance into said store the ramp or entranceway leading from [19] the sidewalk to the door and into defendant's store was at said time and place dry.

VII.

That the plaintiff, Lydia Lamberson, after entering said store and shopping around for some time attempted to leave or depart from said store, and in so doing traveled over the same ramp or entrance-way whereby she had theretofore entered, and at the time of her departure or leaving, the said ramp or entrance-way had water on it, and defendant was negligent in allowing said water to be upon and remain on said ramp or entrance-way without any sand, or ashes, or some matting to cover the same.

That the ramp or entrance-way into the store wherein the plaintiff, Lydia Lamberson, entered at the time of her entrance therein and at the time of her departure therefrom and at the time of her injury was under the exclusive control of the defendant herein.

XIII

That when the plaintiff, Lydia Lamberson, attempted to leave the store and pass over said ramp or entrance-way, as a proximate cause of the same being wet, it was due to defendant's negligence, and the absence of any ashes or sand or matting on said ramp or entrance-way, she slipped and fell onto the ramp or entrance-way, and as a result of said fall, broke both bones in her right forearm near the wrist, and by reason thereof she sustained some permanent disability.

IX.

That the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over

said ramp or entrance-way, at the time and place of receiving said injury.

X.

That the defendant did not give the plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance-way, neither prior to nor at the time of her passing out and over said ramp or entrance-way. [20]

XI.

That at the time the plaintiff, Lydia Lamberson, was passing out and over said ramp or entrance-way there were no ashes, sand or matting or any other substance thereon to render the same safe for patrons and persons using said ramp or entrance way to pass safely over the same, and particularly the plaintiff, Lydia Lamberson.

XII.

That the plaintiffs have suffered general damages in the sum of \$1750.00 and special damages in the sum of \$195.00.

CONCLUSIONS OF LAW

That the defendant, Montgomery Ward and Company, a corporation, was negligent at said time and place in maintaining and permitting and allowing said ramp or entrance-way to have water on it.

That the defendant, Montgomery Ward and Company, a corporation, was, as a matter of law, negligent at said time and place in failing to notify said plaintiff, Lydia Lamberson, of the existence of wa-

ter upon said ramp or entrance-way, and said defendant was further negligent in not having salt or sand or ashes or matting upon said ramp or entrance-way at said time and place.

That the plaintiff, Lydia Lamberson, was not contributorily negligent as a matter of law in passing out and over said ramp or entrance-way at the time and place of receiving her injuries as aforesaid.

That as a conclusion of law plaintiffs have sustained general damages in the sum of \$1750.00 and special damages in the sum of \$195.00, lawful money of the United States of America.

Let judgment be entered for said sums in favor of the plaintiffs, Chester A. Lamberson and Lydia Lamberson, and against the defendant, Montgomery Ward and Company, a corporation, together with costs of said suit.

Done at Pocatello, Bannock County, Idaho, in open court on this 28 day of October, A. D., 1942.

WILLIAM HEALY

Circuit Judge acting as

District Judge.

(Service Accepted.)

[Endorsed]: Filed October 28, 1942. [21]

[Title of Court and Cause.]

NOTICE OF APPLICATION TO HAVE COSTS
AND DISBURSEMENTS TAXED

To the above named defendant, Montgomery Ward
& Company, a corporation, and to its attorney,
Otto E. McCutcheon:

You, and each of you, will please take notice, that
on the 28th day of October, A. D., 1942, at ten
o'clock A. M., in the Clerk's Office of the United
States District Court, at Pocatello, Idaho, the plain-
tiff will make application to the Clerk of said Court
to have costs and disbursements taxed in the above
entitled case as set out and specified in the Memo-
randum of Costs and Disbursements hereunto at-
tached, hereby referred to and made a part of this
notice.

Dated this 21st day of October, A. D., 1942.

WILLIAM S. HOLDEN

Res. and P. O. Address,
Idaho Falls, Idaho

WALTER H. ANDERSON

Res. and P. O. Address,
Pocatello, Idaho

CLYDE BOWEN

Res. and P. O. Address,
Pocatello, Idaho

Attorneys for Plaintiff.

(Service Accepted.)

[Endorsed]: Filed October 24, 1942. [22]

[Title of Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

June, 1942—Clerk's fee	\$ 10.00
Oct. 15, 1942—Shorthand Reporter's Fee, 1 day @ \$10.00 per diem, one-half of which was paid by plaintiff and defendant respectively by agreement.....	5.00

Total—Exclusive of witness' fees.....	\$ 15.00
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Witness Fees:

Mrs. Elaine Merrill, Residence Idaho
Falls, Idaho

Witness Fee, 1 day @ \$2.00.....\$ 2.00

Mileage from Idaho Falls to Pocatello, and return, 100 miles @ 5¢ 5.00

7.00

Mrs. A. C. Criddle, Residence Idaho
Falls, Idaho,

Witness Fee, 1 day @ \$2.00.....\$ 2.00

Mileage from Idaho Falls to Pocatello, and return, 100 miles @ 5¢ 5.00

7.00

Mrs. H. D. Thueson, Residence Idaho
Falls, Idaho,

Witness Fee, 1 day @ \$2.00.....\$ 2.00

Mileage from Idaho Falls to Pocatello, and return, 100 miles @ 5¢ 5.00

7.00

\$ 36.00

State of Idaho,

County of Bannock—ss.

Clyde Bowen, Being first duly sworn, on oath
deposes and says:

That he is one of the attorneys for the plaintiffs
in the above entitled cause; that he has examined
the above and foregoing Memorandum of Costs and

Disbursements; that he has knowledge of the facts to the effect that the items thereof are correct, that the disbursements therein set forth have been necessarily incurred in said action, and that the services charged therein have been actually and necessarily performed as therein stated.

CLYDE BOWEN.

Subscribed and Sworn to Before me this 21st day of October, A. D., 1942.

[Seal]

DOROTHY E. JOHN,

Notary Public.

Res.: Pocatello, Idaho.

[Endorsed]: Filed October 24, 1942. [23]

[Title of Court and Cause.]

NOTICE OF MOTION FOR STAY
OF PROCEEDINGS

To the plaintiffs, Chester A. Lamberson and Lydia Lamberson, and their counsel, William A. Holden, Walter H. Anderson, and Clyde Bowen; and to W. D. McReynolds, Clerk of said Court:

You and each of you will please take notice that defendant has filed in said Court and in said cause its motion for a stay of execution to give time to file motion and petition for a new trial of said cause, copy of which is hereto annexed, made a part hereof and hereby referred to for greater particularity. You will further take notice that said motion and application for stay of execution will

be presented to Hon. William Healy, Circuit Judge, acting as District Judge in said Court, on Wednesday, October 28th, 1942, at 9:30 in the forenoon of said day at the court room of said court in the Federal Building at Pocatello, Idaho, or at chambers, or as soon thereafter as counsel can be heard.

Dated October 27th, 1942,

OTTO E. McCUTCHEON,

Attorney for Defendant.

Residing at Idaho Falls,
Idaho.

[Endorsed]: Filed October 28, 1942. [24]

[Title of Court and Cause.]

MOTION FOR STAY OF EXECUTION TO
GIVE TIME TO FILE MOTION FOR NEW
TRIAL:

To the Honorable District Court of the United States
for the District of Idaho, Eastern Division:

Now comes Montgomery Ward & Company, a Corporation, the defendant in the above entitled cause, and moves this Court to stay execution upon the judgment entered herein in favor of Chester A. Lamberson and Lydia Lamberson, plaintiffs, against Montgomery Ward & Company, a Corporation, defendant, in the above cause on the 28th day of October, 1942, for forty two days from said date, to give time to said defendant to file in the Clerk's office in said Court a petition and motion

for a new trial, pursuant to Section 840 of Title 28 of the United States Code and Rule 50 of the rules of practice of the United States District Court for the District of Idaho, adopted September 19th, 1938, and now in full force and effect.

Dated October 27th, 1942.

OTTO E. McCUTCHEON,

Attorney for Defendant.

Residence and Post Office Address: Idaho Falls, Idaho.

[Endorsed]: Filed October 28, 1942. [25]

In the District Court of the United States in and for the District of Idaho, Eastern Division

No. 1183

CHESTER A. LAMBERSON and LYDIA LAMBERSON,

Plaintiffs,

vs.

MONTGOMERY WARD and COMPANY, a corporation,

Defendant.

JUDGMENT

This cause having been heard before the court without the intervention of a jury, and the court having heretofore made its findings of a fact and announced its conclusions of law and filed the same herein;

It is Therefore, Upon the Findings and Order of the Court, Ordered, Adjudged and Decreed that the plaintiffs, Chester A. Lamberson and Lydia Lamberson, do have and recover of and from the defendant, Montgomery Ward & Company, a corporation, the sum of \$1945.00, lawful money of the United States of America, and costs of this suit taxed at 36.00 Dollars.

That an execution is awarded for the collection of this judgment.

Witness the Hon. William Healy, Circuit Judge acting as District Judge of said Court, and the Seal thereof this 28th day of October, 1942.

[Seal] W. D. McREYNOLDS,

Clerk United States District
Court.

[Endorsed]: Filed October 28, 1942. [26].

[Title of Court and Cause.]

ORDER GRANTING STAY OF
EXECUTION:

This cause came on for further hearing on the 28th day of October, 1942, on the motion of Montgomery Ward & Company, a Corporation, defendant, in the above cause, for an order staying execution therein, to give time for filing a petition and motion for a new trial in this cause, and, after hearing counsel, it was

Ordered that the issuance of execution upon the

judgment in the above cause entered on the 28 day of October, 1942, be stayed until the 9th day of December, 1942, on condition that the defendant execute a surety bond or undertaking in accordance with Rule 61 of this Court adopted September 19th, 1938, in the amount of the judgment and costs. This order is made and entered to give defendant time to file a petition and motion for a new trial in said cause. Bond shall be furnished within 5 days.

Dated October 28, 1942.

WILLIAM HEALY,

Circuit Judge Acting as District Judge.

[Endorsed]: Filed October 28, 1942. [27]

[Title of Court and Cause.]

BOND STAYING EXECUTION

Whereas, a judgment was entered in the above entitled cause in said Court on the 28th day of October, 1942, in favor of the plaintiffs and against the defendant, Montgomery Ward & Company, a corporation, and thereafter and on said 28th day of October, 1942, said defendant moved the said Court to grant an order staying the issuance of an execution therein for the purpose of giving defendant time for filing a petition and motion for new trial in the said cause under the provisions of Title 28, Section 840, United States Code, and

thereafter on the same date an order was made and entered by said Court staying the issuance of execution until the 9th day of December, 1942, on condition that the defendant execute a surety bond or undertaking and file the same with the Clerk, within five days of the date of said order in an amount equal to the said judgment and costs, and,

Whereas, said judgment and costs amounted to the sum of \$1981.00.

Now, therefore, the undersigned, United States Fidelity and Guaranty Company, of Baltimore, Maryland, a surety company authorized to transact business within the State of Idaho, and authorized under the laws of the United States to become a surety in causes pending in the United States District Courts, does hereby acknowledge itself security for the defendant, Montgomery Ward & Company, a corporation, for the payment of that certain judgment rendered in said Court and said cause as aforesaid for the sum of \$1981.00, being the judgment and costs, for the purpose of a stay of execution on said judgment for the term ending on December 9th, 1942, and it does hereby bind itself to pay the said judgment with interest and accruing costs on said date, December 9th, 1942, if the said defendant does not, on or before said date, file its petition and motion for a new trial in the office of the Clerk of said Court, as permitted by the order hereinbefore referred to staying execution. [28]

In Witness Whereof, the said surety has executed this undertaking by its duly authorized agent and attorney in fact at Idaho Falls, Idaho, this 30th day of October, 1942, for the uses and purposes hereinbefore mentioned.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND, a corporation,

[Seal] By F. O. SIMONSON,
Its Authorized Agent.

Countersigned:

A. V. LARTER,
Attorney in Fact.

[Endorsed]: Filed November 2, 1942. [29]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

To the plaintiffs, Chester A. Lamberson and Lydia Lamberson, husband and wife, and their counsel, Messrs. W. S. Holden of Idaho Falls, Idaho, and Walter H. Anderson and Clyde Bowen of Pocatello, Idaho, and to the Honorable W. D. McReynolds, Clerk of said Court:

Now comes Montgomery Ward and Company, a corporation, the defendant in the above entitled cause, and moves this Court for an order setting aside the judgment herein and granting a new trial in the above entitled cause on the following grounds and for the following reason, viz:

I

That the findings of fact and conclusions of law do not support the judgment and that the judgment is contrary to the facts and contrary to law in the following particulars:

(a) That there was no evidence introduced at the trial showing that the defendant had knowledge of the presence of water on the ramp of the store entrance upon which Lydia Lamberson alleged she fell.

(b) That there was no showing that there was water present on the ramp or floor of the vestibule for a sufficient length of time to give or charge defendant with constructive notice thereof, for, as a matter of law, only a long continued defective condition will result in such constructive notice, but on the contrary, in this case the proof showed that the condition complained of had existed if at all, for a few minutes only.

(c) That there was no proof that the presence of water on the ramp, if any, was a condition that was not obvious to the said defendant and as well within the knowledge of the plaintiff as the defendant.

(d) That there was no sufficient proof of want of contributory negligence on the part of the said defendant, Lydia [30] Lamberson, but on the contrary there was sufficient evidence proving that she was contributorily negligent in respect to her disregard of an obvious condition, and that she assumed any risk incident to the use of the ramp.

(e) That under the proofs adduced at the trial

no lawful judgment could or should have been made or entered therein except a judgment in favor of the defendant and against the plaintiffs.

II

Insufficiency of the evidence to support or justify the findings of fact, conclusions of law and judgment, and that the said findings of fact, conclusions of law and judgment entered herein are each and all against law.

III

Accident, surprise, mistake and misfortune in the preparation for the trial and in the conduct of the trial which ordinary prudence and diligence could not have guarded against in the following particulars, to wit:

(a) The attendance of a witness for the defendant, to wit, Corporal Harold Dee Tracey, could not be secured for the reason that he had been for some months prior to the date of said trial enlisted in the armed forces of the United States of America, and his exact whereabouts could not be ascertained by the exercise of reasonable diligence and no communication could be had with said Harold D. Tracey, and it was indicated to an agent of the defendant that Tracey's absence from army flying school would not be permitted by his commanding officer, which was not ascertained until October 14th, 1942, the day before the trial.

(b) That the attendance of a witness, to wit, Russell Molen, could not be secured for the reason that said Molen for some months prior to said

trial had been a civilian employee of the United States Army Flying Service, and his absence from his duties would not be permitted by his commanding officer, which was not ascertained until October 14th, 1942, the day before the trial.

(c) That the attendance of the said witnesses Tracey [31] and Molen, could not be enforced because of their exemption from the service of process, to wit, a subpoena, under a Federal statute ordinarily referred to as the Soldiers and Sailors Relief Act.

(d) That the defendant was surprised at the testimony of the plaintiff Lydia Lamberson, at the said trial, in that the said plaintiff gave entirely different testimony relative to the place of her fall and the manner of her fall than the defendant would have been able to show if the said witness Harold Lee Tracey had been procurable.

IV

That a new trial is necessary to prevent a failure of justice in that:

(a) The evidence of the said Harold Dee Tracey would conclusively prove that plaintiff Lamberson did not slip on a wet ramp in the manner she described in her testimony but that she fell face downward and laid on her abdomen, the upper half of her body lying on the sidewalk adjoining the ramp on the west, and the lower half of her body, face downward, laid on the floor of the ramp.

(b) That said Tracey reached the side of said

plaintiff to assist her up within a few seconds of the time plaintiff fell and the ramp was dry when said Tracey reached the fallen plaintiff.

V

That the amount of the judgment allowed for general damages was excessive for the following reasons:

(a) That the injury to the plaintiff, Lydia Lamberson, was not sufficient to cause, and did not cause, permanent disability in respect to her ability to carry on her regular occupations as a saleswoman and a housewife.

(b) That the proof offered by the defendant showed that recovery was seventy five per cent complete and will increase with time and the ordinary use of the wrist.

(c) That a first class reduction of the fracture resulted from her treatment by her own physician.

[32]

(d) She produced no expert testimony proving permanency of injury.

VI

Error in law occurring on the trial of said cause in the admission of evidence hereinafter detailed over the objection of the defendant and in the following particulars, to wit:

(a) It was erroneous to allow the plaintiff Lydia Lamberson, to testify that the wetted condition of her garments was not caused by her act of urinating when the proof showed that urination occurred while said plaintiff was unconscious;

(b) Evidence of the witnesses Criddle and Thueson to the effect that they were present and saw an employee of the defendant throw water on the floor or ramp of the entrance to the store in which plaintiff Lydia Lamberson, is alleged to have sustained injury, for the reason that the time factor involved in the action of the said employee as testified to by said witnesses Criddle and Thueson, was not connected in any way with the time of day at which the said plaintiff Lydia Lamberson, is alleged to have fallen; further that said testimony was not admissible unless it had been first shown that the wetting of the ramp or vestibule occurred prior to the time that the said Lydia Lamberson is alleged to have fallen, and, therefore, the proper foundation for the admission of said testimony was not laid by the plaintiff.

VII

Newly discovered and material evidence discovered since the trial, and which was not and which could have not been obtained on the trial by the exercise of reasonable diligence as more fully appears from the affidavits of Sergeant Harold D. Tracy and Otto E. McCutcheon attached hereto and made a part hereof. That said newly discovered evidence consists of the following: Whereas, heretofore it has been thought by counsel and various employees of the defendant that there was no eye witness to the fall of the plaintiff, Lydia Lamberson, it now appears from the affidavit of the said Tracy that he actually was in a position to see

and did see said plaintiff fall and immediately ran to her assistance after seeing her fall. That said evidence [33] was not discovered by any one representing the defendant until receipt of the affidavit of the said Tracy which came into the hands of the affiant McCutcheon on the 4th day of December, 1942. That said plaintiff, Lydia Lamber-son, fell near the outer or westerly edge of the ramp or entrance and that she fell forward face downward on the front of her body, and that about one half of her body projected on to the sidewalk and one half was on the ramp. That the ramp was dry at the time plaintiff fell.

This motion will be based upon the affidavits of G. W. Miller, William A. Voss, Sergeant Harold D. Tracy, and Otto E. McCutcheon, all of which are attached hereto and made a part hereof; also upon all the files and records in the said action including a transcript of the testimony which has been ordered from the reporter but which has not been received at the date hereof; also upon the minutes of the Clerk and the Court taken at the trial and a brief to be hereafter served and filed under Rule 30 of this Court. Said motion is also based upon the provisions of Rule 50 of this court. Reference is also made to the order of the Court heretofore made and entered herein by the trial judge, William Healy, Circuit Judge presiding, under date of October 28th, 1942, during the October term of said Court at which said judgment was entered, under the terms of which proceedings were stayed and defendant was given forty

two days time, to wit, until December 9th, 1942, within which to serve and file said motion for a new trial.

Dated December 7th, 1942.

OTTO E. McCUTCHEON,

Attorney for Defendant.

Residence and P. O. Address:

Idaho Falls, Idaho.

[Endorsed]: Filed December 8, 1942. [34]

[Title of Court and Cause.]

AFFIDAVIT OF G. W. MILLER

State of Idaho,

County of Bonneville—ss.

G. W. Miller, being first duly sworn, on oath deposes and says:

That he is a citizen of the United States and a resident of the State of Idaho; that since on or about the 5 day of September 1941, he has been the manager of the Idaho Falls store of the defendant and the immediate superior of employees therein. That on the 26th day of November, 1941, there was in the employ of defendant at Idaho Falls Harold Dee Tracy and Russell Molen. That among the duties of the said Tracy he was charged with keeping sidewalks, entrances, and floors clean and selling merchandise in the shirt section, and in the performance of his said duties on the said 26th day of November, 1941, he observed a woman fall face downward on the ramp of the third en-

trance from the southwest corner of the said store, and said person was trying to rise to her feet after she had fallen. That said Tracy made a sketch showing the position of the fallen person at the request of William A. Voss and the affiant and the said sketch is now attached to an affidavit of the said Voss presented herewith in support of a motion for a new trial. That said Tracy left defendant's employ on or about the 12th day of February 1942, to go into the army of the United States. That on or about the 25th day of September, 1942, affiant was informed by counsel that the case of Lamberson, et ux. vs. Montgomery Ward & Company, was set for trial for the 15th day of October, 1942, and affiant immediately began a search for the purpose of ascertaining the whereabouts of the said Tracy and was told by persons who purported to know that Tracy was at a flying school at Wichita Falls, Texas, and affiant wrote said witness at that address; affiant never received a reply to said letter and the same was never returned; that affiant continued to make search and inquiry as to the whereabouts of the said Tracy and was later informed that he had been trans- [35] ferred to a flying school at Blytheville, Arkansas; that affiant again wrote the said Tracy at the latest address given asking him to secure permission from his commanding officer to have a leave of absence from his duties so as to attend the said trial and testify in said case, and asking him, Tracy, to reply if a furlough could be secured; that said letter was never returned

and said Tracy never answered, indicating that the commanding officer would not allow him to absent himself from his service in the army; that affiant undertook to secure the attendance of the said Russell Molen but that the said Molen advised affiant that the military commanders would not allow him, Molen, leave to attend said trial. That affiant believes that if the testimony of the said Tracy had been available, the trial court would have found in favor of the defendant and against the plaintiffs. This affidavit is made for the purpose of supporting defendant's motion for a new trial.

G. W. MILLER.

Subscribed and sworn to before me this 5th day of December, 1942.

[Seal]

LOUISE KEEFER,

Notary Public.

Residing at Idaho Falls,
Idaho. [36]

[Title of Court and Cause.]

AFFIDAVIT OF WILLIAM A. VOSS

State of Illinois,

County of Cook.—ss.

William A. Voss being first duly sworn on his oath deposes and says:

That in the months of December, 1941, and January and February, 1942, he was employed as a lawyer in the Law Department of defendant Mont-

gomery Ward & Company at its office and store in the State of California. That at the times mentioned affiant was the lawyer to whom was reported claims for accidents occurring at stores of the defendant in the State of Idaho and elsewhere. That on or about the 12th day of December, 1941, affiant's attention was directed to an accident which it was alleged occurred on premises of the Idaho Falls, Idaho, store, in which it was claimed that one of the plaintiffs, Lydia A. Lamberson, had fallen on a ramp or entranceway situated north of B Street and facing Shoup Avenue in said city, and thereupon affiant took charge of said case and made an investigation of the facts relative to the claim of the said Lydia A. Lamberson and in pursuance of such investigation affiant requested G. W. Miller, store manager of the Idaho Falls store, and Harold D. Tracey to furnish information to affiant which would furnish facts upon which affiant might properly weigh the question of allowing or rejecting a claim for damages which the said Lydia A. Lamberson had made on said defendant through plaintiffs' attorney, William S. Holden of Idaho Falls. That as to statements from said Harold D. Tracey affiant requested that said Tracey should set forth in complete detail all he knew about the alleged accident including a statement showing exactly where the customer was lying when he found her and in what position she was lying. That he should prepare a sketch showing the relative location of the west line of the ramp or vestibule and the east line of the sidewalk on the westerly face of

the store showing as nearly as possible exact conditions existing represented by the time immediately after Mrs. [37] Lamberson's fall and the few *second* which elapsed between the instant of the fall and the instant that Tracey ran to the prostrate customer. In response to affiant's request for such information and diagram there was prepared by or under the direction of said Harold D. Tracey a sketch indicating thereon the information which had been requested by the affiant, and the original sketch as furnished to affiant on or about the 12th day of February, 1942, is attached hereto marked Exhibit A, and made a part hereof. That said sketch remained in affiant's possession in his office at Oakland, California, until the same was transmitted to Otto E. McCutcheon, Idaho Falls, Idaho, after the plaintiffs had commenced their suit against the defendant in the above entitled court and cause. That copies of said sketch are attached to copies of this affidavit and made parts thereof. That this affidavit is made for the purpose of supporting defendant's motion for a new trial of the said action.

WILLIAM A. VOSS

Subscribed and sworn to before me this 30th day of November, 1942.

[Seal]

EMILY HOCH

Notary Public.

Residing at: Chicago, Ill.

My Commission Expires

Dec. 23, 1942. [38]

Exhibit A

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Woman was on hands and
knees trying to get up
when found by Mr. Tracy.

AFFIDAVIT OF HAROLD D. TRACY

State of Arkansas,
County of Mississippi:

I, Sergeant Harold D. Tracy, having first been duly sworn state: That on the 26th day of November, 1941, I was employed as salesman by Montgomery Ward Company, in Idaho Falls, Idaho. In the early part of the afternoon of November 26, 1941, and while I was working in the shirt department on the ground floor, and near the front entrance, my attention was attracted by a woman whose name I afterwards learned was Lydia Lamberson, falling just in the entrance to the building. I immediately ran to her, and when I reached her she was kneeling with her feet and lower limbs inside of the entrance, and her hands and upper portion of her body on the adjoining sidewalk; I assisted this woman to her feet, and helped her into the store, and there turned her over to the Assistant Manager, Mr. Earl Hoops. As I assisted this woman to her feet she remarked that she believed her arm was broken. This was the only remark made by her in my presence. The weather was good, and the entrance to the store and sidewalk were dry. I had not thrown water on the entrance to the building before or after the fall, or at any other time that entire day. Shortly after the fall I made and furnished to Mr. Miller a sketch showing Lydia Lamberson's position in the entrance at the time I discovered, and assisted her to her feet.

This the 30th day of November, 1942.

SGT. HAROLD D. TRACY

To the above statement was subscribed and sworn to before me a Notary Public by Sergeant Harold D. Tracy this the 30th day of November, 1942. Witness my hand and seal as such Notary Public this the 30th day of November, 1942.

R. P. KIRSHMER

Notary Public [40]

[Title of Court and Cause.]

AFFIDAVIT:

State of Idaho,

County of Bonneville—ss.

Otto E. McCutcheon being first duly sworn deposes and on oath says:

That he is the local counsel for defendant and was employed in said capacity immediately after the said case was commenced. That in the file affiant received from William A. Voss, counsel for defendant at Oakland, California, was a sketch purporting to show the position of plaintiff Lydia Lamberson as she fell and immediately after she had fallen on the ramp of the Idaho Falls store November 26th, 1941. That said sketch was retained in the possession of affiant until he attached it to the affidavit of William A. Voss submitted herewith in support of defendant's motion for a new trial. That on December 4th, 1942, affiant re-

ceived the affidavit of Harold D. Tracy attached to the foregoing motion for new trial, and until that date affiant had been informed by agents of defendant that there were no eye witnesses to the plaintiff's fall, whereas the fact was otherwise in that Tracy saw plaintiff fall and ran to her assistance immediately; that affiant was surprised by the developments and presents the facts as they now appear in support of defendant's motion for a new trial; that on October 14th, 1942, affiant caused subpoenas to be issued by the Clerk of the Court requiring Tracy and Molen to appear as witnesses for defendant, and placed same in the hands of the Marshal for service, but same was returned with a certificate that said witnesses could not be found.

OTTO E. McCUTCHEON

Subscribed and sworn to before me this 5th day of December, 1942.

[Seal]

LOUISE KEEFER

Notary Public.

Residing at Idaho Falls,
Idaho.

(Service Accepted). [41]

[Title of Court and Cause.]

NOTICE OF
HEARING ON MOTION FOR NEW TRIAL

To the Defendant and its Counsel, Otto E. McCutcheon, Esq.:

You are hereby notified that pursuant to Rule 18 of Rules of Practice of the U. S. District Court for the District of Idaho the Motion for a New Trial filed herein is called up for a hearing, please govern yourself accordingly.

Done at Pocatello, Idaho, this 23rd day of December, 1942.

WM. S. HOLDEN

Res: Idaho Falls, Idaho

CLYDE BOWEN

Res: Pocatello, Idaho

W. H. WITTY

WALTER H. ANDERSON

Res: Pocatello, Idaho

Attorneys for Plaintiff

(Affidavit of Mailing Attached).

[Endorsed]: Filed December 26, 1942. [42]

ORDER DENYING MOTION
FOR NEW TRIAL

In Chester A. Lamberson et al v. Montgomery Ward & Company, No. 1183-E, the motion for a new trial is denied.

Dated January 29, 1943.

WILLIAM HEALY

United States Circuit Judge

cc OTTO McCUTCHEON

Idaho Falls, Idaho

WALTER H. ANDERSON

Pocatello, Idaho

[Endorsed]: Filed February 1, 1943. [43]

[Title of Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Montgomery Ward and Company, a corporation, the above named defendant, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled court and cause on the 28th day of October, 1942, which said judgment was in favor of the plaintiffs herein and against the defendant.

Dated this 22 day of January, 1943.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and Post Office

Address:

Idaho Falls, Idaho.

[Endorsed]: Filed January 22, 1943. [44]

[Title of Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That We, Montgomery Ward and Company, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, organized under the laws of the State of Maryland, and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound to Chester A. Lamberson and Lydia Lamberson, the plaintiffs and appellees in the above entitled cause, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22 day of January, 1943.

Whereas, on the 28th day of October, 1942, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that court, wherein Chester A. Lamberson and Lydia Lamberson were plaintiffs, and Montgomery Ward and Company, a corporation, was defendant, a judgment was rendered against said defendant in the sum of Nineteen Hundred Forty-Five (\$1945.00) Dollars with costs taxed at Thirty-six (\$36.00) Dollars, and said defendant having filed in the office of the Clerk of said District Court

a notice of appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

Now, the condition of this obligation is such, that if said Montgomery Ward and Company, a corporation, the appellant, shall prosecute said appeal and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

MONTGOMERY WARD AND

COMPANY, a corporation [45]

By OTTO E. McCUTCHEON

Its attorney of record.

Residing at Idaho Falls,

Idaho,

Principal.

UNITED STATES FIDELITY

AND GUARANTY COM-

PANY, a corporation,

[Seal] By A. V. LARTER

Its attorney in fact,

Surety.

F. O. SIMONSON

Resident Agent. [46]

GENERAL POWER OF ATTORNEY

No. 55226

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing

under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint A. V. Larter of the City of Idaho Falls, State of Idaho its true and lawful attorney in and for the County of Bonneville for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said A. V. Larter may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 10th day of January, A.D. 1939.

UNITED STATES FIDELITY
AND GUARANTY
COMPANY.

By M. BARRATT WALKER
(Signed) Vice-President.

[Seal] J. E. GITTINGS
(Signed) Assistant Secretary.

State of Maryland
Baltimore City,—ss.

On this 10th day of January, A. D. 1939, before me personally came M. Barratt Walker, Vice President of the United States Fidelity and Guaranty Company and J. E. Gittings, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they [47] resided in the City of Baltimore, Maryland; that they, the said M. Barratt Walker and J. E. Gittings were respectively the Vice President and the Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A.D. 1939.

[Seal]

A. D. PATRICK

(Signed) Notary Public.

State of Maryland,
Baltimore City,—Sct.

I, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that

A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 10th day of January, A.D. 1939.

[Seal]

M. LUTHER PITTMAN

(Signed) Clerk of the Superior Court
of Baltimore City.

COPY OF RESOLUTION

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys [48] with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant

Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performances of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obliga-

tion, stipulation, or undertaking, or anything in the nature of either of the same.

I, Robert H. Sayre, an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power [49] of attorney given by said Company to A. V. Larter of Idaho Falls, Idaho, authorizing and empowering him to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July, 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company this 10th day of January, 1939.

[Seal]

ROBERT H. SAYRE

Assistant Secretary.

[Endorsed]: Filed January 22, 1943. [50]

[Title of Court and Cause.]

PETITION FOR APPROVAL OF
SUPERSEDEAS AND STAY ON APPEAL:

Comes now Montgomery Ward and Company, a corporation, the above named defendant and appellant, and represents as follows:

That judgment was entered in the above entitled court and cause on the 28th day of October, 1942, in favor of Chester A. Lamberson and Lydia Lamberson, plaintiffs, and against Montgomery Ward and Company, a corporation, defendant, for Nineteen Hundred Forty-five (\$1945.00) Dollars, and costs of suit taxed at Thirty-six (\$36.00) Dollars; that said defendant has appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and desires the court to fix the amount of a Supersedeas Bond, approve the form thereof, and also approve the United States Fidelity and Guaranty Company, a corporation, as surety, and thereupon order a stay of proceedings according to law.

Now, therefore, petitioner prays that the Court fix the amount of said supersedeas bond, approve the bond tendered herewith, and the surety thereon, and order a stay according to law.

Dated this 22 day of January, 1943.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and Post Office

Address: Idaho Falls, Idaho.

[Endorsed]: Filed January 22, 1943. [51]

[Title of Court and Cause.]

ORDER APPROVING BOND AND
GRANTING A STAY OF EXECUTION

The defendant, Montgomery Ward and Company, a corporation, having filed its notice of appeal from the judgment rendered in the above entitled cause in favor of the plaintiffs, Chester A. Lamberson and Lydia Lamberson, and against the defendant Montgomery Ward and Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of a supersedeas bond and approving the bond tendered by said appellant, and the surety executing the same, and granting said stay of proceedings.

Now, therefore, It is Hereby Ordered, that the amount of said supersedeas bond be and it is hereby fixed in the sum of Three thousand (\$3,000.00) Dollars, and the bond tendered by the said defendant Montgomery Ward and Company, a corporation, in said sum with the United States Fidelity and Guaranty Company, a corporation, as surety, be and the same is hereby in all respects approved and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated this 2nd day of February, 1943.

LLOYD L. BLACK

U. S. District Judge

Acting as District Judge for said District
of Idaho under designation.

[Endorsed]: Filed February 2, 1943. [52]

[Title of Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That We, Montgomery Ward and Company, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, organized under the laws of the State of Maryland, and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto Chester A. Lamberson and Lydia Lamberson in the full and just sum of Three Thousand Dollars (\$3,000.00), lawful money of the United States of America, to be paid to the said Chester A. Lamberson and Lydia Lamberson, their heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of January, 1943.

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in said Court between Chester A. Lamberson and Lydia Lamberson, as plaintiffs, and Montgomery Ward and Company, a corporation, as defendant, a judgment was rendered in favor of the plaintiffs and against said defendant in the sum of Nineteen Hundred Forty Five (\$1945.00) Dollars, and bearing interest at the rate of six per cent per annum from the date thereof, to wit: On the 28th day of October, 1942, with

costs taxed and amounting to the sum of Thirty six (\$36.00) Dollars, and said Montgomery Ward and Company, a corporation, having filed in said Court a notice of appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be held in San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if said Montgomery Ward and Company, a corporation, shall prosecute said appeal to effect, and satisfy the said judgment in full, [53] together with costs, interest and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award against it, then the above obligation to be void; otherwise to remain in full force and virtue.

MONTGOMERY WARD AND
COMPANY,

a corporation,

By OTTO E. McCUTCHEON

Its attorney of record.

Residing at Idaho Falls,
Idaho, Principal.

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY,

a corporation,

By A. V. LARTER

[Seal]

Its attorney in fact,

Surety.

F. O. SIMONSON

Resident Agent.

The foregoing Bond is approved as to sufficiency, form and surety, and is allowed as a Supersedeas this 2nd day of January, 1943.

LLOYD L. BLACK

District Judge.

(General Power of Attorney, No. 55226, printed in full as attached to Appeal Bond also attached to this Supersedeas Bond.)

[Endorsed]: Filed February 2, 1943. [54]

[Title of Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 15, 1942

This cause came on for trial before the Court without a jury. Messrs. Clyde Bowen, W. H. Anderson and William S. Holden appeared as counsel for the plaintiffs, and Otto E. McCutcheon, Esquire, appeared as counsel for the defendant.

Lydia Lamberson, Chester A. Lamberson, Ethel Criddle, Elaine Merrill and Mrs. Chilson were sworn and examined as witnesses and documentary

evidence was introduced on the part of the plaintiffs, and here the plaintiffs rest.

Dr. C. M. Cline, C. W. Miller, Onita Williams and C. D. Peterson were sworn and examined and other evidence was introduced on the part of the defendant, and here the defendant rests.

On rebuttal, Lydia Lamberson was recalled and further examined, and here both sides close.

Both parties were granted leave to submit memorandums of authorities within a few days, and the cause was submitted without argument otherwise. [55]

[Title of Court and Cause.]

CIVIL DOCKET ENTRIES

1942

Jun. 5—File complaint

Jun. 5—Issue summons

Jun. 12—File summons—served

Jun. 15—File motion to dismiss and motion for more definite statement, and notice of motion

Jun. 22—File notice to present motions on briefs

Jun. 25—File defendant's brief on motions

Jun. 29—File plaintiff's reply brief on motions

Jul. 7—File Order on motion for more definite statement, motion to dismiss, motion for bill of particulars, etc.

Jul. 7—Copies of order to Clyde Bowen, Otto E. McCutcheon, Walter H. Anderson and Wm. S. Holden

- Jul. 20—File bill of particulars
- Jul. 24—File stipulation re: Aug. 12 to answer
- Aug. 11—File answer
- Oct. 14—File Prae, Issue Subp D. T.—Dr. A. R. Sodaquist—for plaintiff
- Oct. 14—File Subp—Dee Tracey and Russell Olen not found
- Oct. 15—Record of trial
- Oct. 20—File defendant's brief
- Oct. 20—File opinion
- Oct. 24—File notice to tax costs
- Oct. 24—File memorandum of Costs and disbursements
- Oct. 28—File notice of motion for stay of proceedings
- Oct. 28—File findings of fact and conclusions of law
- Oct. 28—File motion for stay of execution
- Oct. 28—File judgment (Plff—\$1945.00 & \$36.00 costs)
- Oct. 28—Copy of judgment handed to defendant's counsel
- Oct. 28—File order granting stay of execution
- Nov. 2—File bond staying execution
- Dec. 8—File motion for new trial
- Dec. 26—File notice to submit motion for new trial 1943
- Jan. 2—File brief on motion for new trial [56]
- Jan. 5—File plff's brief on motion for new trial
- Jan. 8—File affidavit of mailing copy of deft's brief
- Jan. 8—File defendant's brief in reply

- Jan. 22—File notice of appeal
Jan. 22—Copies of notice to Clyde Bowen and
Walter H. Anderson
Jan. 22—File cost bond on appeal
Jan. 22—File petition for approval of Supersedeas,
etc.
Jan. 28—File transcript
Feb. 1—File order denying motion for new trial
Feb. 2—File supersedeas bond
Feb. 2—File order approving bond and granting
stay of execution
Feb. 2—File motion and order for additional at-
torneys for defendant
Feb. 18—File statement of points, etc.
Feb. 18—File designation of contents of record on
appeal [57]
-

[Title of Court and Cause.]

STATEMENT OF POINTS ON WHICH DE-
FENDANT INTENDS TO RELY ON AP-
PEAL

Comes now the defendant-appellant, Montgomery Ward and Company, a corporation, and makes the following Statement of the Points upon which it intends to rely in the appeal taken to the United States Circuit Court of Appeals of the Ninth Circuit in the above entitled cause:

I.

That the court erred in denying the motion of the defendant for an order requiring plaintiffs to

make a more definite statement of their alleged cause of action referred to as paragraph Second and sub-paragraphs (a) and (b), for the reason that the said complaint was uncertain and indefinite in the particulars described in said sub-paragraphs and each of them.

II.

(1) The court erred in finding that the defendant was negligent in allowing water to be and remain upon the ramp or entrance way without any sand or ashes or some matting to cover the same;

(2) The court erred in finding that at the time of plaintiff's injury the ramp or entrance way was under the exclusive control of the defendant;

(3) The court erred in finding that the plaintiff fell upon the ramp or entrance way as a proximate cause of the same being wet and that the same was wet due to defendant's negligence and the absence of ashes or sand or matting upon said ramp;

(4) The court erred in finding that the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over said ramp or entrance way;

(5) The court erred in finding that the defendant did not give plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance way prior to or at the time of her passing out and over the same: [58]

(6) The court erred in finding that the said ramp or entrance way was unsafe for patrons and persons using same because there were no ashes, sand or matting thereon;

(7) The court erred in admitting the testimony

of Lydia Webb Theusen and Ethel Criddle regarding the presence of water on the ramp in question for the reason that it was not shown that said testimony was related to the time of the accident.

III.

That the evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, or at all, for which reason the Court erred in making and entering its findings of fact, and conclusions of law and judgment in favor of the plaintiffs.

IV.

That under the proofs submitted the only lawful judgment which could or should have been entered in said cause was a judgment in favor of the defendant and against the plaintiffs.

That the reasons for the foregoing Statement of Points are set forth as follows:

a. There was no proof that defendant had knowledge of the presence of water on the ramp or floor of the store entrance upon which plaintiff Lydia Lamberson alleged that she fell.

b. There was no proof that there was water present on the ramp or floor of the entrance for a sufficient length of time prior to the alleged fall of the plaintiff Lydia Lamberson to give or charge defendant with constructive notice thereof.

c. The proof affirmatively shows that the presence of water on the ramp or floor of the entrance to the store as alleged by plaintiffs was visible and

obvious to the plaintiff Lydia Lamberson, and thus she had knowledge thereof.

d. There was proof that plaintiff Lydia Lamberson was contributorily negligent in disregarding the dangers of an obvious condition of which she had knowledge and the defendant had none, and that plaintiff Lydia Lamberson, assumed any risk incident to her use of the ramp and stepping into a spot of water which she alleges was on said ramp or floor at the moment. [59]

e. The defendant was not an insurer of the safety of the plaintiff Lydia Lamberson as an invitee.

V.

That the Court erred in awarding to the plaintiffs a lump sum of money for general damages without specifying what portion of said award was for permanent injuries alleged to have been sustained by the said plaintiffs.

Respectfully submitted,

W. B. POWELL

Residence: 2825 East 14th
Street, Oakland, California.

W. L. SCHOENER

Residence: 2825 East 14th
Street, Oakland, California.

OTTO E. McCUTCHEON

Residence: Idaho Falls, Idaho
Attorneys for the Appellant-
Defendant.

(Service Accepted.)

[Endorsed]: Filed Feb. 18, 1943. [60]

[Title of Court and Cause.]

TRANSCRIPT

This matter came on for hearing at Pocatello, Idaho, before the Honorable William Healy, United States Circuit Judge, presiding. Trial was held October 15, 1942, without a jury.

APPEARANCES

William S. Holden, Esq.,

Idaho Falls, Idaho

Clyde Bowen, Esq.,

Pocatello, Idaho

Messrs. Witty and Anderson,

Pocatello, Idaho

Attorneys for the Plaintiffs.

Otto E. McCutcheon, Esq.,

Idaho Falls, Idaho

Attorney for the Defendant. [61*]

The Court: Are you gentlemen ready in the matter set for this morning, Lamberson against Montgomery Ward and Company.

Mr. Bowen: The plaintiff is ready.

Mr. McCutcheon: We are ready.

* Page numbering appearing at foot of page of original Reporter's Transcript.

MARY LYDIA LAMBERSON

Being called as a witness on behalf of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen.

Q. State your full name.

A. Mary Lydia Lamberson.

Q. Are you married Mrs. Lamberson?

A. Yes, sir.

Q. What is your husband's name?

A. Chester A. Lamberson.

Q. Will you state if you are one of the plain-
tiffs in this action? A. Yes sir.

Q. The action of Lamberson versus Montgomery
Ward and Company. A. Yes sir.

Q. How long have you and Mr. Lamberson been
married?

A. Almost thirty-five years.

Q. How old are you? [63]

A. I am 57 now, and we have been married almost
thirty-six years, I said thirty-five and should have
said thirty-six.

Q. Where is your home?

A. 500 L street, Idaho Falls, Idaho.

Q. How long have you lived in Idaho Falls?

A. Since 1902.

Q. Directing your attention to the 26th of No-
vember, 1941, where were you living at that time?

A. 500 L. Street, Idaho Falls, Idaho.

Q. Together with Mr. Lamberson, as husband
and wife. A. Yes sir.

(Testimony of Mary Lydia Lamberson.)

Q. On that date—November 26, 1941, were you engaged in any occupation of any kind?

A. Yes sir.

Q. Other than housewife. A. Yes sir.

Q. What was that?

A. Cosmetic saleswoman.

Q. Just tell the Court—strike that please—did you on that date go to Montgomery Ward and Company's store in Idaho Falls? A. Yes I did.

Q. Can you tell the Court the names of the street near Montgomery Ward and Company store?

A. Yes, the one on the South is B street and the one on the [64] north is C street, running east and west.

Q. What street does the store face on?

A. That is Shupe street—or Shupe avenue..

Q. Do you know how many entrances there were on Shupe Avenue going into that store on November 26, 1941? A. Four I think.

Q. Describe the direction you took in entering the store on that day, if you will Mrs. Lamberson?

A. I came down town and parked the car on C street and went into the third door into the men's department.

Q. From which way are you counting when you say the third entrance into the store?

A. The third from the south.

Q. What department did that go in?

A. Into the men's department.

Q. Did you have occasion to go in there?

A. Yes, I was shopping and I thought I would find something for Christmas.

(Testimony of Mary Lydia Lamberson.)

Q. Approximately what time was it that you went into the store on that day?

A. About three o'clock.

Q. When did you say?

A. About three o'clock in the afternoon.

Q. How long were you there and what did you do?

A. I was there about thirty minutes and went to the next [65] division, and then I looked at some hosiery, lingerie and Christmas presents.

Q. After being in the store that length of time what did you do?

A. I went to the ready-to-wear department. I went through that middle section in that ready-to-wear department and I turned north and when I got up the steps I visited a while and looked around and I came down to the men's department and that is the way I left the store.

Q. What door did you leave through?

A. The third door from the south.

Q. Is that the door you entered?

A. Yes sir.

Q. Did anything occur when you left the store.

A. I had to open the door and as I stepped out, I took about the second step and I slipped. I seen water in the doorway as I went down. It took both my feet from under me and in order to save my hip from being broken I fell on my wrist and I broke my wrist.

Q. Describe the entrance way there, what it is constructed of.

(Testimony of Mary Lydia Lamberson.)

A. Tile, it is a kind of a wide entrance and I cut the corner pretty close and was close to the window on the left as I went down.

Q. Tell us, if you can—describe the entrance-way, where does it commence and where does it end, about how long it is Mr. Lamberson. [66]

A. I don't know how long it is. It commences at the edge of the sidewalk and runs into the store.

Q. Where was it with regard to the edge of the sidewalk that you fell?

A. When I fell down my feet lacked about eighteen inches of being to the sidewalk, on the slick tile.

Q. When you went into the store was there any water on that entrance?

A. No sir. I went in on the other side and there was no water.

Q. What occurred after you fell?

A. I thought to myself, I have broke my arm as sure as shooting, that is the way I said it. I didn't have any means of getting up. On the left side there wasn't any room and I put my hand down and I couldn't put any pressure on it because of the pain, I was sick and I didn't know how I would get up, and just then someone came to the door and said "did you fall" and I said "I certainly did and I think I have a broken arm." He took me back to the manager and said "here is a lady that fell in the entrance and she thinks she has a broken arm.

Q. Were you experiencing any pain at that time?

(Testimony of Mary Lydia Lamberson.)

A. I was in such pain I didn't know where I was at. I was getting sick and I could hardly keep on my feet.

Q. Where were you experiencing the pain?

A. In my right wrist and arm. [67]

Q. What occurred when you were taken back to the store?

A. One fellow took me back to the manager and the manager said: "Can you move your fingers," and I said "yes." They pulled out a stool for me to sit on and I moved them just about as good as I can now. He said: "If you can move your fingers I don't think your arm is broken," and I said: "I hope not but I think it is."

Q. What was done for you?

A. You mean then.

Q. Yes, what was done for you.

A. Well, I was sitting on the stool getting sicker, I was in misery. I couldn't hardly stand it and a couple of ladies and a man came up and asked who I was and where I lived and what doctor I preferred and I told them. I asked for a glass of water; they got me the glass of water and one of the ladies got some bandage and gave first aid. I said if I could get my head down I wouldn't faint away. After I told them several times they took me back to the back, and the next thing I knew I was lying on my back in front of the shoe chairs.

Q. You say that two ladies came up to you, were they employees of the store.

(Testimony of Mary Lydia Lamberson.)

A. Yes sir. They were all employees, the ladies and the man too, they all worked there.

Q. Did you know the names of either of them?
[68]

A. No sir, I didn't.

Q. Next thing you knew, I believe you said, you were lying down, do you know how you came to be lying down?

A. I suppose I fainted away. The first thing I remember the lady pulled my skirt down. I had a heavy skirt on and she said "how do you feel now," and the man who was rubbing my left hand he left about that time, and she said, "do you think you can get up," and between her help and mine I got up and sat in the chair.

Q. Did you have any water on any part of your clothing?

A. I noticed my right hose was wet above the ankle.

Q. How long were you at the store after you were hurt, before you left the store?

A. About ten minutes.

Q. Then did you leave the store?

A. Yes sir, they called a taxi and took me to the doctor's office.

Q. Did anyone assist you to the doctor's office?

A. Yes sir, a man assisted me.

Q. What doctor's office did you go to?

A. Doctor Soderquist.

Q. How far is that from the store?

A. About two blocks and up about a quarter.

(Testimony of Mary Lydia Lamberson.)

Q. His office is upstairs or on the ground floor?

A. Yes sir.

Q. Upstairs. [69] A. Yes sir.

Q. How did you get upstairs?

A. The fellow helped me out of the taxi, and this fellow said "you are sure shaking" and I said "I am jerky" and he said "you put your arms around my neck and I will see that you get upstairs".

Q. He did that, and you did?

A. Yes sir.

Q. Was the doctor there?

A. Yes sir, he met me at the office door.

Q. What happened when you got there?

A. He said "it is you is it" and I told him what the manager said, that if I could move my fingers my arm wasn't broken and he said "there is nothing to that," he said "you could move your fingers and still have a broken arm." He said "we will make an X-ray." He took and moved the bone and you could hear it grind. He said "I will take an X-ray" and when he was developing the X-ray I sat there and I got nauseated again and he took me in the office and laid me on the table. When the picture was fixed, he figured it out good, and got a cast and he pulled on my hand and Mr. Lamberson pulled on the upper part of my arm and he put it in a case and bound it.

Q. Was Mr. Lamberson with you when you went to the doctor's office? [70]

(Testimony of Mary Lydia Lamberson.)

A. Not at first, but I think Mr. Cecil Peterson called him and he was there after that.

Q. After the cast was applied what occurred then?

A. I sat up a minute or two and then put on my coat and Mr. Lamberson took me home.

Q. How long was this cast on your arm?

A. Five weeks.

Q. The cast was on five weeks.

A. Yes sir.

Q. Who removed the cast for you?

A. Doctor Soderquist.

Q. What is the fact during this five weeks, as to whether you suffered pain in the wrist—your right wrist?

A. I suffered pain all along. I was flat on my back for two weeks.

Q. Were you able to care for yourself during those two weeks that you say you were flat on your back?

A. No sir, I wasn't.

Q. Did someone take care of you?

A. Yes sir.

Q. Who did?

A. Mr. Lamberson took care of me.

Q. Were you able to do any housework?

A. No sir, I couldn't.

Q. Did someone do your housework for you? [71]

A. Mr. Lamberson was doing all the housework, anyway, he tried to do it.

Q. How long were you confined to your home

(Testimony of Mary Lydia Lamberson.)

and unable to do this work that you have spoken of?

A. I didn't do any housework for about three and a half months. Yes, I guess it was three and a half months before I did any work.

Q. During that time what did you experience in the right wrist?

A. I suffered a lot of pain in it. If I tried to do anything I couldn't. I was sick a lot.

Q. During that time did you do any work as a cosmetic saleswoman?

A. Not to go outside.

Q. How much time were you off from that business after you were hurt?

A. About three months, yes, it was a good three months.

Q. Do you know what your earnings a month were from the sales business?

A. I cannot tell right down to the penny, but it should amount to about sixty dollars a month.

Q. Mrs. Lamberson, immediately after you were injured did you yourself look at your right wrist?

A. Yes, I did.

Q. Describe how it looked.

A. My hand was thrown back this way (illustrating) and my wrist bulged down.

Q. Show the Court where the wrist bulged down.

[72]

A. Right here.

Q. On which hand? A. This hand.

Q. Any swelling on the top of the arm?

(Testimony of Mary Lydia Lamberson.)

A. Swollen bad. There was a spot right there, in fact there is a spot there now. That spot was almost as red as blood at that time.

Q. Is the right wrist as strong as it was before?

A. No sir, it is very, very poor, I cannot peel vegetables, even now.

Q. Do you have as much grip as you had before you were hurt?

A. No sir, I haven't.

Q. Prior to the time you were injured was the wrist deformed or straight?

A. It was straight.

Q. Since your injury what is its condition?

A. I have a badly deformed arm.

Q. Remove your coat and hold up both of your arms?

(Witness did as requested)

Q. Prior to the time you were injured were you able to do your housework?

A. All my life I did my own work. I never had a hired girl more than ten days.

Q. What is the fact as to whether you suffer any pain in the right wrist at this time? [73]

A. I suffer all the time.

Q. And what is the fact as to whether you suffered any pain in the right wrist prior to the time you hurt it?

A. I never did.

Q. And do you have pain now.

A. I have not been free from pain since I broke it. I still suffer pain.

(Testimony of Mary Lydia Lamberson.)

Q. Did you at the time you fell, on November 26 1941, and fractured your wrist, did you injure any other part or portion of your body?

A. I bumped my ankle when I went down. I didn't skin it, but it made it black. It is still black. I also hurt my back at that time.

Mr. Bowen: You may take the witness.

Cross Examination

By Mr. McCutcheon:

Q. When did you first engage in cosmetic selling?

A. About the 17th of September 1941.

Q. Last year. A. Yes sir.

Q. In reply to a question which Mr. Bowen asked about your earnings, you said they should have been about sixty dollars a month. Have you any records to show what your earnings were in that period from September to November 1941?

[74]

A. No sir, I just got a commission.

Q. Had you engaged in that business before that time?

A. No sir, never before September 1941.

Q. So that up to the 17th of November you had been in that business about two months, or just two months?

A. Yes sir, two months.

Q. What line did you sell. A. Avon.

Q. What does it consist of?

A. All cosmetics, lip sticks and so on, men's shaving preparations and then you have extracts.

Q. Did you canvass from door to door?

(Testimony of Mary Lydia Lamberson.)

A. Yes I canvassed from door to door and then I have customers that deal with me regularly.

Q. Did you make any sales by telephone or by customers calling at your home?

A. I never made many.

Q. Some. A. Maybe some.

Q. Can you tell what your earnings were while you were confined to the house?

A. I don't think I could.

Q. How long have you been,—withdraw that,—please strike it,—how long were you confined to the house at that time?

A. Better than three months. [75]

Q. Do you remember of any sales at all during that time?

A. Yes, people called on me, and they called on the phone, but they didn't amount to much. I could have done much better if I could get out.

Q. I was anxious to know what your income was during the time you were home?

A. I cannot tell right now, that was quite a while ago.

Q. Yes, I know. Did you keep books?

A. No sir I didn't.

Q. You didn't keep books before this accident?

A. No, except our household books.

Q. Just your budget. A. Yes sir.

Q. But not on this cosmetic business.

A. No, that's all we kept.

Q. How do you arrive at the earning of \$60.00 a month?

(Testimony of Mary Lydia Lamberson.)

A. I figured my commission.

Q. Did you get the commission out of the \$60.00 or was that the sale and the commission?

A. I got the commission out of what I sold.

Q. What was the commission out of the \$60.00?

A. The commission out would be,—you say out of fifty?

Q. Do you mean that the commission was fifty per cent?

A. No sir, the commission was forty per cent.

Q. I see,—these goods were placed in your hands at a cer- [76] tain price, you got your compensation above that.

A. I had to take orders,—I would get the orders and send them in.

Q. Then you got your commission.

A. I got the goods and got the commission.

Q. Was \$60.00 which you say was the amount of your earnings, the selling price or the commission only?

A. That would be my commission.

Q. How much were your commissions at the time you were confined to your house?

A. Well, my commission would be forty per cent on what I sold.

Q. Can you tell us what that amounted to?

A. I don't remember that.

Q. You remembered the other, the \$60.00 you earned before, but you can't remember after the accident.

(Testimony of Mary Lydia Lamberson.)

A. I didn't remember much after the accident for quite a while.

Q. You didn't do any selling perhaps, for a few days after the accident? A. No sir.

Q. Can you remember the names of the customers you sold to while you were confined to your home? A. No sir, I don't remember.

Q. You don't remember any of them?

A. I have one lady that buys off me most of the time. She doesn't buy much, her name is Madison.

[77]

Q. Is she a beauty operator or just a housewife.

A. Just a housewife.

Q. Where did you say that you parked your car on that day?

A. Between Park Avenue and Shupe, on one of those three hour parking spaces.

Q. And you walked down Shupe Avenue to the entrance. A. That's right.

Q. The first door that you reached was the door to the agricultural implement department?

A. Yes sir.

Q. You didn't go in there. A. No sir.

Q. You entered the first door that a customer of your character would go into. The men's department.

A. Yes sir, I went in the men's department.

Q. What was the condition of the entrance when you went in.

A. The condition of the entrance.

(Testimony of Mary Lydia Lamberson.)

Q. Yes, what was the condition of the entrance when you went in?

A. It seemed to be dry.

Q. What was the weather condition that day in Idaho Falls?

A. A grand day, the sun shone all day.

Q. Do you know what the temperature was at that time?

A. I don't think I know that.

Q. Was it freezing?

A. No, but probably would be about five o'clock.

[78]

Q. This occurred before five.

A. About three-thirty in the afternoon.

Q. About three-thirty.

A. Yes sir.

Q. As you left the store when did you first observe any water in the entrance or the vestibule.

A. I went out of the door and took a couple of steps and slipped. I seen the water at that time.

Q. You didn't see the water before you slipped.

A. Not before I hit it.

Q. How much of an area was there that was wet.

A. Well, I got my coat good and wet.

Q. Did you have rubbers on that day?

A. No sir.

Q. What part of your coat was wet?

A. Right on the back where I sat down.

Q. Do you know how that was caused?

A. Yes sir, going down in the water.

Q. Was there any water on your clothing as you left the store?

(Testimony of Mary Lydia Lamberson.)

A. Yes, my coat was quite wet.

Q. Do you recall as Mr. Peterson helped you into the taxi cab some friends of yours passed by, and they made some remark? A. Yes sir.

Q. Do you know their names?

A. One lady was Mrs. Deschamp. [79]

Q. That is Mrs. Omar Deschamp?

A. Yes sir, the garageman.

Q. It is a fact that you believe that you lost consciousness in the store after this accident?

A. Yes, I did.

Q. Do you know whether anyone cast any water on you while you were lying there or while you were in the store? Do you know, did anyone throw any water on you?

A. When I came to Mr. Peterson was rubbing my hand and there was some water on my wrist.

Q. Had your face been bathed, or was there evidence of water on your face?

A. I cannot recall whether my face was bathed or not. I was too sick for that.

Q. When you left the building just prior to the accident what did you do relative to noticing the pathway from the sidewalk to the door. Did you make any observation?

A. I didn't understand that.

Q. When you opened the door on the way out of the store after doing your shopping, did you look at the floor of the entrance?

A. I looked at the other side when I was sitting there.

(Testimony of Mary Lydia Lamberson.)

Q. Before the accident, as you opened the door on the way out of the store?

A. No sir, I didn't. [80]

Q. You didn't make any observation of the condition there? A. No sir.

Q. Was there any snow on the sidewalk, that you saw? A. Not a bit of snow.

Q. You say that Mr. Lamberson was out of work at the time of the accident and that he did the housework? A. Yes sir.

Q. Have you resumed your selling of cosmetics? A. Yes sir.

Q. When did you take up that work again after the accident? A. After the accident.

Q. Yes.

A. I think it was along the latter part of March or the first of April.

Q. Of this year. A. Yes sir.

Q. How does the business progress?

A. It is and has been fine.

Q. Up to your expectation, you are making as much as you did before.

A. I could have made more at Christmas.

Q. But you were incapacitated at that time.

A. Yes, I was laid up.

Q. Since you resumed your occupation you have been able to follow it as you did before. [81]

A. Yes, I have been selling.

Q. Your age is now fifty-seven.

A. I was fifty-six at that time.

Q. At the time of the accident.

(Testimony of Mary Lydia Lamberson.)

A. Yes sir.

Q. Would you mind stating whether you had passed through the menopause before the accident?

A. I don't know whether I know just what you mean.

Q. Had you experienced the change of life?

A. I had passed through it.

Mr. McCutcheon: That is all.

Redirect Examination

By Mr. Bowen:

Q. At the time you fell in the entrance way of that store was there any rubber matting on top of the tile? A. There was no matting.

Mr. McCutcheon: That is objected to as being wholly immaterial. It has not been shown that there was any want of ordinary care. I doubt that any rubber matting would be required under the law that applies to this case.

The Court: Overruled.

A. There was no matting of any kind, just plain tile.

Q. State the fact as to whether or not the top surface of the tile in the entrance way was smooth or how was it.

A. It was smooth I believe. I didn't do much examining, [82] I was too sick for that.

Q. Counsel has asked regarding the water that your face was bathed with, or that may have been applied to your face after your accident, or after

(Testimony of Mary Lydia Lamberson.)

you were injured. How much water, if you know, was applied to your face?

A. I don't know whether there was any applied to my face. I think they were rubbing it on my arm.

Q. Where was the water on your coat?

A. Right down the right side as I went down.

Q. The right side. A. Yes sir.

Q. From your waist down, was that where it was wet? A. Yes sir.

Q. When was it that you observed that the water was on your stocking and coat?

A. Just as I raised up when the lady helped me up in the shoe department.

Q. How soon was that with reference to when the accident occurred? How long was it after the accident?

A. It was close to ten minutes I would judge.

Q. About ten minutes after the accident.

A. Yes sir.

Q. Was the water on your coat and stockings before you fell? A. No sir.

Q. It was after you fell that you observed the water? [83]

A. Yes sir, it was after I fell that the water was there.

Mr. Bowen: That is all, thank you.

Recross Examination

By Mr. McCutcheon:

Q. What kind of shoes did you wear on that day?

(Testimony of Mary Lydia Lamberson.)

A. I wore Red Cross shoes, just like I have today.

The Court: May I see your shoes?

A. Yes sir.

The Court: Rubber heels.

A. Yes sir.

Q. You didn't have rubbers on that day?

A. I didn't need rubbers.

Q. About how high is that heel?

A. I would say about an eighth of an inch.

Q. I mean the whole heel, not the rubber portion, the entire heel, the rubber and the other portion.

A. It is a Cuban heel.

Q. About one and a half inches, it appears that way to me.

A. Maybe not quite that high, no not quite.

Mr. McCutcheon: Is there a ruler handy Mr. Bailiff.

(Whereupon the bailiff procured a ruler and the heel on witness's shoe was measured)

A. It is just an inch and a half in the front of the heel.

Mr. McCutcheon: It is a rubber heel, that [84] is, the lift is rubber. I think that is all of this witness.

Redirect Examination

By Mr. Bowen:

Mr. Bowen: I think we should show the width of the heel in order that the whole matter may be in the record.

(Testimony of Mary Lydia Lamberson.)

Mr. Anderson: (Measuring the heel) It is about an inch and a half wide, across the front.

Mr. Bowen: That is all.

CHESTER A. LAMBERSON

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Are you the husband of the lady who just testified? A. Yes sir.

Q. Will you state your name for the record?

A. Chester A. Lamberson.

Q. And you are one of the plaintiffs named here? A. Yes sir.

Q. Where are you living at this time?

A. 500 L Street, Idaho Falls, Idaho.

Q. Are you employed in any business or occupation? [85] A. Yes sir.

Q. What do you do?

A. Collector for the East Side Lumber Company.

Q. How long have you been so employed?

A. Since the first of June.

Q. Directing your attention to the 26th of November 1941, where were you living at that time.

A. 500 L Street, Idaho Falls, Idaho.

(Testimony of Chester A. Lamberson.)

Q. The same place. A. Yes sir.

Q. How long had you been living there at that time? A. Since 1940.

Q. Do you recall the occasion of Mrs. Lamberson being injured in November 1941?

A. Yes sir.

Q. Just tell us when you first knew about that?

A. It was on the 26th of November, somewhere around three or four in the afternoon.

Q. How were you notified?

A. I was over with Dave Sweeney in the real estate business, I was out and the stenographer got a telephone call, and she told me when I came in to come to the Doctor's office?

Q. What Doctor? A. Doctor Soderquist.

Q. And did you go to the Doctor's office when you got the message, on that date? [86]

A. Yes sir.

Q. Did you see Mrs. Lamberson there?

A. Yes sir, in the Doctor's office.

Q. What did you observe?

A. She said "look Dad what I have done". I saw her arm was broke, she was pale and in pain. The Doctor said to come in the X-ray room and I went in and saw the picture of the break.

Q. Can you tell the Court what you saw?

Mr. McCutcheon: Objected to as it would not be the best evidence. No foundation has been laid.

The Court: I think it may be admitted for what it is worth. He may answer.

A. He took two pictures, one laying like that

(Testimony of Chester A. Lamberson.)

and the other this way. You could see the crack. It looked like a piece of bone broke off the side, which there was, you could see and the Doctor said there was.

The Court: Do you have the X-ray.

Mr. Anderson: I am afraid we won't have these particular ones.

Mr. McCutcheon: I move to strike what the Doctor says from the answer because——

Mr. Bowen: ——yes I think that should go out.

The Court: That will be stricken. [87]

Q. After being in the Xray room what occurred?

A. I looked at the picture and went into the office with the Doctor and proceeded to get ready to set her arm. He got the splint or cast ready and on her arm and then he pulled her arm and I helped hold her arm and the nurse helped.

Q. Did Mrs. Lamberson make any complaint of pain during that process?

A. I would say she did.

Q. Did you observe her during that time?

A. Yes sir.

Q. What did you observe as to her physical features?

A. She looked like she was in quite a little agony and pain.

Q. Did you look at her wrist and arm at that time? A. Yes sir.

Q. Describe the appearance of her right wrist and arm at that time.

(Testimony of Chester A. Lamberson.)

A. It looked like it was broke off, and set off to the side.

Q. Was there any swelling on the wrist?

A. Yes sir, quite bad. It looked like the bone was about to push through.

Q. What was done when the cast was put on the arm?

A. We sat around and talked a little while when he got her fixed up.

Q. And did you take Mrs. Lamberson home?

A. Yes sir, I took her home in the car. [88]

Q. How did you take her home?

A. I took her home in the car. We walked to the car. I took her home and she stayed there.

Q. Did you assist your wife to walk to the car?

A. Yes, I held her arm.

Q. Did you notice any water or moisture on any portion of your wife's clothing?

A. I noticed her stocking was wet and stained.

Q. Did you notice which stocking it was?

A. The right side.

Q. What time did you arrive home, in your judgment what time was it?

A. I would say a little after four o'clock. I know that it was between three and four that I got the call to come over.

Q. Over to the Doctor's office.

A. Yes sir.

Q. What did Mrs. Lamberson do when you got home?

(Testimony of Chester A. Lamberson.)

A. I took her coat off and she went and laid down.

Q. Did you live at home following that accident? A. Yes sir.

Q. Was Mrs. Lamberson able to do her housework? A. No sir.

Q. Who did the housework?

A. Pa did the work.

Q. You mean that you did it?

A. Yes sir. [89]

Q. How long did you perform the housework after that time?

A. I should judge better than three months. I am still doing some of it.

Q. During that time did Mrs. Lamberson complain of pain in her wrist? A. Yes sir.

Q. How often did she make complaint?

A. Sometimes it would be three or four times in a day.

Q. Up to the present time?

A. Yes sir.

Q. At this time does Mrs. Lamberson make complaint of pain in her right wrist and arm?

A. Yes sir.

Q. What is the fact as to whether or not prior to the time that your wife was injured, that she looked after housework?

A. I didn't get that.

Q. What is the fact as to whether or not prior to the time your wife was injured, that she looked after her housework and performed her work.

(Testimony of Chester A. Lamberson.)

A. She did all of it.

Q. Did she ever complain of pain or injury in her right arm or wrist before that date?

A. No sir.

Q. Since her injury have you observed any difference in her ability to perform her housework, than before that time? A. Yes sir. [90]

Q. Tell the Court what you have observed?

A. Well, in using her arm in lifting, cutting, peeling vegetables or anything like that, she can't do it at all.

Q. Which arm? A. The right one.

Q. Directing your attention to the time in Doctor Soderquist's office when the cast was being applied, did anyone else come in Doctor Soderquist's office at that time?

A. Yes sir, Doctor Cline.

Q. You say Doctor Cline came in.

A. Yes, Doctor Cline came in and Doctor Soderquist said "is it all right" and Doctor Cline said "yes it is".

Q. Do you know what they were talking about when he said "is it all right"?

A. I suppose they were talking about the arm.

Q. Do you know,—did Doctor Soderquist make a charge for his services to your wife?

A. Yes sir.

Q. Do you know the amount of that charge?

A. I think it was forty dollars, it might have been forty-five or thirty-seven, I don't just remember but we have a statement of it.

(Testimony of Chester A. Lamberson.)

Q. Have you ever received a bill from Doctor Cline?

A. Yes sir, I kept getting one for \$5.00 but I don't know what it is for.

Q. Mr. Lamberson, I show you what has been marked for identif- [91] ication as plaintiff's exhibit one, will you examine it,—you have exhibits 1, 2, and 3 will you state what they are, if you know.

A. Statements from Doctor Cline for \$5.00.

Q. They were sent to you, were they?

A. Yes sir.

Mr. Bowen: We will ask that they be admitted in evidence.

Mr. McCutcheon: May I ask the witness a question or two.

The Court: Yes, you may.

By Mr. McCutcheon:

Q. Have you one or two brothers in Idaho Falls? A. One.

Q. What are his initials? A. C. E.

Q. Where did he live in December 1941?

A. On K street.

Q. Where was your residence then?

A. In 1941.

Q. Yes.

A. L street, we moved from 660 G street over to L street.

Mr. Bowen: We have offered exhibits 1, 2, 3 and 3A.

Mr. McCutcheon: We object that it is not [92]

(Testimony of Chester A. Lamberson.)

material, no proper foundation is laid and there is no pleading to support this element. The only charge in the complaint is the \$45.00 which it is alleged that Doctor Soderquist charged. The statements are not addressed to the residential address of this plaintiff at that time. The address seemed to be some house on J. street.

The Court: I assume counsel may have some purpose in offering these. The objection is overruled. They may be admitted.

PLAINTIFF'S EXHIBIT No. 1

Statement

Dr. C. M. Cline

First Security Bank Building

Telephone 88

Idaho Falls, Idaho, Jun 30 1942.

C. A. Lambertson

J St.

City

To professional services:

5.00

[Endorsed]: Filed Oct. 15, 1942.

PLAINTIFF'S EXHIBIT No. 2

Statement

Dr. C. M. Cline

First Security Bank Building

Telephone 88

Idaho Falls, Idaho Dec 29 1941.

(Testimony of Chester A. Lamberson.)

C. A. Lamberson

J St.

City

To professional services: 5.00

[Endorsed]: Filed Oct. 15, 1942.

PLAINTIFF'S EXHIBIT No. 3

Statement

Dr. C. M. Cline

First Security Bank Building

Telephone 88

Idaho Falls, Idaho May 30 1942.

C. A. Lamberson

J St.

City

To professional services: 5.00

(Envelope attached.)

[Endorsed]: Filed Oct. 15, 1942. [154-a]

By Mr. Bowen:

Q. Has Doctor Cline ever performed any other service for you, other than on the date that your wife was injured? A. Never.

Q. Did you ever employ him to perform any other service? A. No sir.

Q. You have never employed him.

A. No sir.

(Testimony of Chester A. Lamberson.)

Mr. Bowen: That is all, you may take the witness.

Cross Examination

By Mr. McCutcheon:

Q. Did Doctor Cline take the pictures?

A. No sir.

Q. Doctor Soderquist took the pictures?

A. His nurse took them. [93]

Q. Beyond stepping in to Doctor Soderquist's office at the time as you have testified, Doctor Cline performed no service for you.

A. No sir.

Q. Is it possible that this bill could be charged against your brother C E is it.

A. No it is not possible. He didn't live on G. street and his initials are C C.

Q. Yours are C A. A. Yes sir.

Q. Could it be that the bill is against him?

A. It could be possible, but I don't think he ever had Doctor Cline.

Q. Was there an anesthetic administered at the time your wife's arm was set? A. No sir.

Q. How far is it from Doctor Soderquist's office to where the car was parked that day?

A. It is two blocks or better.

Q. You didn't have a taxi take you to your car, you walked up the street, did you?

A. That's right, we walked.

Mr. McCutcheon: That is all.

(Testimony of Chester A. Lamberson.)

Redirect Examination

By Mr. Bowen: [94]

Q. Please explain to the Court, if you know, the office arrangement of Doctor Cline and Doctor Soderquist.

A. You come up from the north and turn and go into a hall door into the waiting room, the Xray room is here, Cline's office here and Doctor Soderquist's office here (indicating).

Q. Do both Doctors have the same waiting room?

A. Yes sir.

Q. Do their office join, just a partition between them?

A. Yes sir, I think they do.

Mr. Bowen: That is all, thank you.

Mr. McCutcheon: That's all.

ETHEL CRIDDLE

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Will you please state your name?

A. Ethel Criddle.

Q. Where do you live?

A. 204 6th street.

Q. What city and State?

A. Idaho Falls, Idaho.

(Testimony of Ethel Criddle.)

Q. How long have you lived there?

A. Since 1924. [95]

A. Are you living there at this time?

A. Yes sir.

Q. Are you acquainted with Mrs. Lamberson?

A. Yes I am.

Q. Are you some relation to her?

A. Well, my father is her grandfather's nephew.

Q. Where were you living on November 26, 1941.

A. At Idaho Falls.

Q. What was the address in Idaho Falls?

A. 204 6th Street, Idaho Falls.

Q. Do you recall the occasion of Mrs. Lamberson being injured? A. Yes sir.

Q. Where were you on that day,—strike that—when did you hear about Mrs. Lamberson being hurt?

A. It was sometime around four o'clock.

Q. That same day.

A. Yes, four o'clock the same day.

Q. Had you yourself been up town in Idaho Falls, on that day? A. Yes sir.

Q. Did you have occasion, or did you go to the Montgomery Ward Company store that day?

A. Yes sir.

Q. Were you alone?

A. No sir, I was with Mrs. Theuson.

Q. Do you recall about what time you went to the Montgomery [96] Ward Company store that day?

(Testimony of Ethel Criddle.)

A. It must have been somewhere between 3:30 and 4 o'clock in the afternoon.

Q. From what street did you enter Montgomery Ward store that day Mrs. Criddle?

A. Shupe Avenue.

Q. Do you know how many entrance-ways there are to Montgomery Ward Company store from Shupe Avenue? A. Four entrances now.

Q. Did you know why Mrs. Theusen was going there?

A. Yes, she was my neighbor and I met her down town on the opposite corner from Montgomery Ward by the Cutter hotel and she asked me to walk to L street with her and I said it was rather late and she said that if I would walk over we could get Glenn to come for me, that is my son. She said, "I have to go to Montgomery Ward to change this article", and I went with her.

Q. Do you recall anything happening just before you entered Montgomery Ward Company store?

A. Well, we noticed a man sweeping water out of the doorway.

Q. Did you later enter the store?

A. Yes sir.

Q. Tell the Court what you did after you went into the store that time?

Q. We both went to the store and Mrs. Theusen took her article [97] to the same department to have it exchanged and I stayed in the front part of the store.

(Testimony of Ethel Criddle.)

Q. Do you know how long you stayed there before you left?

A. It wasn't very many minutes.

Q. Did you and Mrs. Theusen leave together?

A. Yes sir.

Q. What did you do then?

A. We walked out on B street and went over to Park. She suggested that we write a note to my son and put it in the car. We didn't know where he was but we knew where the car was so we wrote that we have gone over to Mrs. Theusen's on L street, and we wanted him to come down there. We went to L. street and when we got about a block from Mrs. Lamberson's home I said; "I have a friend living on L street", I said; "they are the Lambersons do you know them", and she said she thought it was on the corner. Just about that time we met Chester and he said; "what are you doing over in this part of town" and I said "I am going to see you, I have been asked to see that new home and I am going to see it now". He said; "I have just taken Lydia home with a broken arm", and I said; "how did that happen", and he said——

Mr. Bowen: What did you do Mrs. Criddle.

A. I went down and I rang the door bell and it was quite a while before anyone came to the door, I guess she was [98] lying down. I said to Mrs. Theusen, you are going to meet one lady in your neighborhood and I introduced her to Mrs. Lamberson, and I said to Mrs. Lamberson, "how in

(Testimony of Ethel Criddle.)

the world did you break your arm'' and she said that she fell at Montgomery Ward's store in some water by the door, and I said that I saw a man sweeping out the water there.

Mr. McCutcheon: I have let her go on and re-cite all this conversation without any proper foundation being laid down, I will have to object to any more of this conversation.

The Court: Yes, sustained.

Q. Was Mrs. Lamberson's arm in a cast at that time? A. Yes sir.

Q. How long had you known Mrs. Lamberson prior to that time? A. Since 1903.

Q. State what, if anything, you observed as to her physical condition on that date. The date about which you are relating now.

A. She looked very pale and seemed to be in quite a bit of misery with her arm.

Mr. Bowen: You may cross examine.

The Court: We will recess for ten minutes.

11:30 A.M. October 15th, 1942

Cross Examination

By Mr. McCutcheon: [99]

Q. Was Charles Criddle your former husband?

A. Yes sir.

Mr. McCutcheon: That's all.

ELAINE MERRILL

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. State your name to the Court, please.

A. Elaine Merrill.

Q. Where is your home at this time?

A. 660 Lomax, Idaho Falls, Idaho.

Q. How long have you lived in Idaho Falls?

A. Since 1937.

Q. Directing your attention to the day that Mrs. Lamberson was injured, where were you at that time?

A. I was employed at Montgomery Ward's in the mens clothing department.

Q. At what City and State?

A. Idaho Falls, Idaho.

Q. Do you recall seeing Mrs. Lamberson there at that time?

A. I was back in the mens shirt department when I saw Mrs. Lamberson assisted by Mr. Peterson and Mr. Miller. When I first saw her they were getting a stool out of the aisle [100] for her to sit on.

Q. Did you go to where she was?

A. I did. She was very faint. She was about to collapse. I fanned her and then I went to the ladies room to get a glass of water. She drank part of the water and I massaged her brow with

(Testimony of Elaine Merrill.)

a damp cloth to bring her out of the faint. I got the glass in the dressing room.

Q. Where was she?

A. She was sitting on the stool when I left, and when I got back she was on the stool and Mr. Miller and Peterson were assisting her.

Q. Was she on the stool when you last saw her?

A. No, not when I last saw her. She was on the stool and I massaged her brow, and her wrist was swollen and we wrapped it as tight as we could get a bandage around it. It was swollen badly.

Q. What hand was that.

A. It was the right wrist.

Q. How long was she in the store before she left?

A. About ten or fifteen minutes from the time I saw her first until she was in the taxi.

Q. Did she leave the store alone?

A. She was accompanied by Mr. Peterson. I assisted her to the back door and he left with her.

Q. During the time Mr. Lamberson was there in the shoe department [101] did you observe anything on any part of her clothing?

A. Not on the stool. We asked her what Doctor she would like to go to and she said Doctor Soderquist and I called him and asked him if he would come to the store and he said "no" to bring her to the office. When I was at the telephone they took her to the shoe department and she was lying on the floor in the shoe department.

Q. Did you observe anything on her clothing?

(Testimony of Elaine Merrill.)

A. She went to get on a chair and I noticed part of her clothing being wet. I don't remember which part of her clothing it was, but it was from the waist down. I think it may be her coat.

Q. Was that very wet?

Mr. McCutcheon: I object to that as leading.

The Court: She may answer.

A. She drank the water I gave her, but we used a little bit on her wrist and she drank the rest of it.

Q. Did you spill any water on her clothing?

A. No sir, there wasn't any left to spill.

Q. Are you employed by Montgomery Ward and Company at this time?

A. No sir, I am not.

Q. When was the last time you worked for them?

A. It was the 16th of September,—no—it was the following Saturday after the 16th.

Q. After the 16th of September. [102]

A. Yes sir.

Q. What was the reason for leaving the employ of Montgomery Ward and Company?

Mr. McCutcheon Objected to as immaterial.

The Court: Sustained.

Q. How long had you been employed by Montgomery Ward and Company prior to this occasion?

A. I was,—I started in October 1937. I didn't work all of the time, I have a family so was not able to work all of the time.

(Testimony of Elaine Merrill.)

Mr. Bowen: That is all, thank you, you may take the witness.

Cross Examination

By Mr. McCutcheon:

Q. You say that you called Doctor Soderquist.

A. Yes sir.

Q. Where did you have to go from where Mrs. Lamberson was at that time to go to the telephone?

A. I believe I went to the mail order desk. I am not sure where I went to call.

Q. There are telephones on the first floor?

A. Yes sir.

Q. This all occurred on the first floor?

A. I don't remember where I called from. There is a telephone in the infants department, but I don't remember whether I [103] called from there or not. Our mail order department was on the main floor then. I just don't remember.

Q. Was that after you got the water?

A. Yes sir.

Q. Where was the rest room from the place Mrs. Lamberson was?

A. It is on the furniture floor.

Q. That is the third floor? A. Yes sir.

Q. How long were you gone to get the water?

A. Maybe three or four minutes, I was excited and ran.

The Court: Just a moment, let me ask is there an elevator?

A. No sir.

The Court: You may proceed.

(Testimony of Elaine Merrill.)

Q. Did you have any conversation with Mrs. Lamberson at the time you were with her, or during any of the time you were with her?

A. No sir. When she asked for water we were trying to soothe her, she was sick. She was very pale.

Q. When you left was she sitting up?

A. When I went to call the Doctor she was sitting on a stool.

Q. Did you see her at any time lying on the floor?

A. When I came back from calling the Doctor she was lying on the floor. I assisted them in helping her into a chair in the shoe department. [104]

Q. Was she lying on the floor when you went for the water?

A. No sir, she was sitting on the stool.

Q. You helped Mr. Peterson take her to the Taxi cab. A. Yes sir.

Q. Where did the Taxi cab come to, at the store?

A. At the back door of the store.

Q. On the first floor?

A. Yes sir, in the alley.

Mr. McCutcheon: That is all.

Redirect Examination

By Mr. Bowen:

Q. Did Montgomery Ward and Company occupy all of the first floor at that time? A. Yes sir.

Mr. Bowen: That is all, thank you Mrs. Merrill.

Mr. McCutcheon: That's all.

MARY LYDIA LAMBERSON

Being recalled as a witness for the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Mrs. Lamberson, directing your attention to the time you fell, what is the fact as to whether there was sand or ashes on the entrance-way where you fell, at the time you fell? [105]

A. There wasn't any.

Q. Before leaving the store on that occasion did anyone warn you regarding the entrance-way being slippery or wet?

A. No sir, they didn't.

Mr. Bowen: That is all.

Mr. McCutcheon: No questions.

The Court: We will recess until 1:30.

1:30 P. M., October 15, 1942

LYDIA WEBB THUESEN

Being called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Will you please state your name to the Court?

A. Lydia Webb Thuesen.

Q. Where is your home?

A. Idaho Falls.

Q. The address.

A. 588 L and Sage.

Q. How long have you lived there?

(Testimony of Lydia Webb Thuesen.)

A. About a year and a half.

Q. Are you acquainted with Mrs. Lamberson?

A. I have been since November.

Q. Last November. A. Yes sir. [106]

Q. Directing your attention to the month of November 1941, I will ask you if you recall the occasion of Mrs. Lamberson being injured?

A. Yes sir.

Q. Were you downtown in the City of Idaho Falls that day? A. Yes sir.

Q. Did you meet a Mrs. Criddle that day, downtown? A. Yes sir.

Q. Where did you meet her?

A. On the corner of B and Shupe.

Q. Where would that be from the Montgomery Ward Company store in Idaho Falls?

A. Across the street, south.

Q. Did you go any place with Mrs. Criddle?

A. I got her to go with me.

Q. What was that Mrs. Thuesen?

A. I asked her to go with me.

Q. Tell us what you did then?

A. I had just come from Nampa. One of my daughters had sent my other daughter's son a sweater coat and she wanted me to take it back and get a refund, and I was doing that.

Q. Did you go to Montgomery Ward's store?

A. Yes sir.

Q. What entrance did you use in going in the store? A. The men's department. [107]

(Testimony of Lydia Webb Thuesen.)

Q. Do you know how many entrances there are on Shupe Avenue. A. Four.

Q. And which entrance is the mens department.

A. The third.

Q. Do you recall anything happening as you walked up to go in the store at that entrance?

A. Quite a bit of water at the door and a man sweeping there.

Q. How was the weather there that time,—on that day, do you recall the condition of the weather?

A. The weather was fine as we sauntered home.

Q. You were walking? A. Yes sir.

Q. What did you do after you walked into the store?

A. I left Mrs. Criddle in the front of the store while I went on to do the business of returning the sweater.

Q. Did you leave by the same entrance that you came in to the store? A. Yes sir.

Q. Did you observe when you came out whether there was any water in the entrance-way at that time?

Mr. McCutcheon: Objected to as the proper foundation for the admission of this testimony has not been laid. As far as time goes, it might have been after the event which is the subject matter of this suit.

Mr. Bowen: I will be glad to fix the time. [108]

Q. What time of day was it that you went into the store?

(Testimony of Lydia Webb Thuesen.)

A. Between three and four o'clock.

Q. In the afternoon. A. Yes sir.

Q. How long did you remain in the store, in your best judgment?

A. Ten or fifteen minutes.

Q. And then you left the store?

A. Yes sir.

Q. Was there any water in the entrance-way when you walked out? A. I don't recall any.

Mr. McCutcheon: We make the same objection.

The Court: Overruled.

Q. What is the fact as to whether or not you did see some water in the entrance-way as you went in? A. What was that question?

Q. I asked what the fact was as to whether you saw water in the entrance-way when you went in the store. Did you see any water in the entrance-way as you went in?

A. We had to kind of stop on account of a man sweeping there.

Q. After coming out of the store what did you do?

A. We went to B street and down to Park Avenue and back of Carl and John's where Mrs. Cridle's boy had his car parked and we left a note for him to come and get us.

Q. What did you do after that?

A. Walked across Park Avenue kitty-cornered across the Riverside lawn. [109]

Q. Did you go to Mrs. Lamberson's home?

A. Yes sir.

(Testimony of Lydia Webb Thuesen.)

Q. Did you see anyone?

A. She told me she wanted to go and see Mrs. Lamberson's home and I pointed it out to her. We saw Mr. Lamberson coming toward us, and by that time he had gotten to us.

Q. Did you say anything to him?

A. She said she wanted to see his new home. He said he had just taken his wife home with a broken wrist.

Q. Did you go to the Lamberson home?

A. Yes sir.

Q. What did you do then,—strike that please,—did you see Mrs. Lamberson? A. Yes sir.

Q. Describe her appearance.

A. She came to the door after a few minutes, and she was rubbing her arm. It was in quite a bit of pain and she said——

Q. ——which arm was that?

A. Her right arm.

Q. Did it have a cast on? A. Yes sir.

Mr. Bowen: You may examine.

Cross Examination

By Mr. McCutcheon: [110]

Q. What time was that, can you tell?

A. Around four o'clock or probably a little after.

Q. And you cannot fix the time that you entered the store any more definitely than to say that you entered it between three and four.

A. No, I cannot.

Q. How long would it take you to walk over

(Testimony of Lydia Webb Thuesen.)

from the parking place where the Criddle car was parked to the Lamberson house?

A. About twenty-five minutes.

Q. It took both of you about that time?

A. Yes, all of that.

Q. Had you traded at Ward's store?

A. Frequently.

Q. You had traded there? A. Yes sir.

Q. You had not met Mrs. Lamberson before this day. A. No sir.

Q. How long have you lived in Idaho Falls?

A. Eight years.

Q. Up until now. A. Last January.

Q. When you and Mrs. Criddle went into the store did you have any difficulty in getting in?

A. We had to kind of stop so as not to get the water splashed on us. [111]

Q. Can you fix the time it was exactly?

A. No sir, I can't.

Q. Can you tell whether it was before or after Mrs. Lamberson fell? A. Yes sir, it was after.

Q. It was after. A. Yes sir.

Mr. McCutcheon: I would ask the Court to strike the testimony of this witness and Mrs. Criddle concerning the condition prevailing at the time they went into the store because it was subsequent to the event described in the pleadings.

The Court: What have you to say.

Mr. Anderson: Our contention is that they put this water on this entrance; that the defendant or some of its employees did because Mrs. Lamberson

(Testimony of Lydia Webb Thuesen.)

testified that when she went in there wasn't any water and when she came out the water was there and she fell, and closely connected with it, these ladies went in. Our theory is this, and we think there is sufficient evidence to show that they put this water in this entrance-way, and after she had fallen and when these ladies went in they were sweeping it up. It is all closely connected, and we feel that to deny us of this would be to deny us of some material evidence.

The Court: The motion is denied.

Mr. McCutcheon: May we have an exception.

The Court: Certainly. [112]

Q. Were you here this morning when Mrs. Lamberson testified? A. Yes sir.

Q. You heard her testify that she noticed a pool of water in the entrance as she came out of the store?

A. I wouldn't say whether she did or not.

Q. When you went in what was the condition of the entrance?

A. Quite a bit of water on there.

Q. Over the whole area.

A. Right in front of the door was all.

Q. And how deep was it?

A. Not very deep I don't think.

Q. There was someone sweeping it out you say?

A. Yes sir.

Q. Can you say whether that was before or after Mrs. Lamberson fell?

(Testimony of Lydia Webb Thuesen.)

A. It was after, according to the time she was there.

Mr. McCutcheon: That is all.

Mr. Bowen: That is all. The plaintiff rests.

Mr. McCutcheon: Our first witness is Doctor C. M. Cline, it would be out of order but counsel do not object. I will use him now so that he may be excused.

The Court: Very well.

DOCTOR C. M. CLINE

Being called as a witness for the defendant, after being first duly sworn, testifies as follows: [113]

Direct Examination

By Mr. McCutcheon:

Q. State your name?

A. Clifford M. Cline.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. How long have you resided there?

A. With the exception of about one year, since 1907.

Q. And what is your profession?

A. Surgeon.

Q. Were you engaged in that practice in Idaho Falls in June of 1942? A. I was.

Q. And with the exception of one year you have practiced continuously since 1907?

A. Yes, in Idaho Falls.

(Testimony of Doctor C. M. Cline.)

Q. Where did you receive your education?

A. Northwestern.

Mr. Bowen: We will admit his qualifications.

Mr. McCutcheon: I think I would rather inquire.

Q. Did you graduate? A. Yes sir.

Q. And what internship did you serve.

A. Eighteen months on graduation. [114]

Q. Where?

A. At the Cosmopolitan Clinic.

Q. How extensive has been your practice since you started to practice in Idaho Falls, during your residence there?

A. I have been reasonably busy, I think.

Q. Are you licensed to practice in this State?

A. Yes sir.

Q. A member of the American College of Surgeons? A. I am.

Q. Now, Doctor, calling your attention to the date of June 1942,—June the 24th, 1942, did you have occasion to examine Mrs. Lydia Lamberson?

A. I did.

Q. And did you make such an examination?

A. I did.

Q. For the purpose of refreshing your memory I will hand you memoranda which you gave me at that time relative to the examination. What did you find on your examination of Mrs. Lamberson?

Mr. Anderson: We object to this witness testifying to any finding in connection with the fractured wrist, for the reason and upon the ground

(Testimony of Doctor C. M. Cline.)

that it appears that he was consulted at the time of setting the same and for which he made a charge of \$5.00. As the record stands now, at any rate, he was consulted and that his evidence [115] with respect thereto is privileged under the Idaho Statute, and we object on that ground.

Mr. McCutcheon: If I may inquire a question or two further I think I can clear that up.

The Court: Go ahead.

Q. Doctor Cline, did Mrs. Lamberson consult with you ever before this time, and particularly on November 26, 1941, relative to a fracture?

A. She did not.

Q. Did you ever render any professional service to her in that connection?

A. My X-ray laboratory did.

Q. That X-ray machine is your property?

A. It is my private property.

Q. Does Doctor Soderquist have the privilege of using it? A. The full use of it.

Q. On what basis?

A. The charge is turned to my secretary and charged to his patient.

Q. Now, here are some papers marked exhibits 1, 2 and 3, for the plaintiff in this case. I will ask you to examine them. A. Yes sir.

Q. Can you tell what they are.

A. They are statements, the only thing I would know about these would be that it is the usual X-ray charge for cases of this type. [116]

(Testimony of Doctor C. M. Cline.)

Q. Did you ever make any charge for professional services to Mrs. Lamberson?

A. I did not.

Mr. McCutcheon: Now with that I think this is admissible. This examination of the plaintiff was made,—I forget whether it was on stipulation or on Order of Judge Cavanah that she submitted to the examination, but I think she went voluntarily to Doctor Cline in June.

Mr. Anderson: I would like to ask the Doctor a question.

The Court: You may ask.

By Mr. Anderson:

Q. You did go into the room where Mrs. Lamberson was at the time this arm was set and looked at the cast and the arm at Doctor Soderquist's request.

A. I may have and I may not. I don't remember.

Mr. Anderson: We object on the same ground.

The Court: Overruled.

Mr. Anderson: May we have an exception if it is answered.

The Court: You may.

Q. When you examined Mrs. Lamberson on the 24th of June 1942 please state what you found relative to Mrs. Lamberson's physical condition. [117]

A. She gave me a history on November 26, of slipping and falling at the entrance of the Montgomery Ward Store, and that she had injured her right arm back at that time. A fracture of the distal end of the radius, the styloid process. We x-

(Testimony of Doctor C. M. Cline.)

rayed this arm at that time and found the position excellent. She said also that her back was strained but now recovered. She has some swelling in that wrist joint, some limitation of motion also unable to completely flex the fingers. Some deformity at the wrist. Was nervous for three months after the injury. Tonsils out; teeth bad; throat negative; heart negative; blood 120 over 80; reflexes negative; back normal; some arthritic changes in the hands and wrist joints in both hands. Urinalysis made.

Q. Doctor, have you seen her since that time?

A. No I haven't.

Mr. McCutcheon: Would it be permissible for the Doctor to look at her arm now?

Mr. Anderson: We are perfectly willing to have Doctor Cline examine here in Court here, but we do not waive the objection we formerly made.

The Court: Very well.

Q. Doctor will you look at her arm and wrist.

A. You mean examine her arm now.

Q. Yes.

A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; [118] that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the evidence of arthritic changes are about the same.

Q. Arthritic changes would not be the result of the fracture?

A. I think not. After an injury arthritic

(Testimony of Doctor C. M. Cline.)

changes are sometimes more noticeable than otherwise. Arthritis can originate without any injury.

Q. Would not pyorrhea have a tendency to create arthritic changes?

A. It is one of the many causes.

Q. What result was obtained in reducing the fracture.

A. The position of the bones is excellent. The fracture shows very good apposition.

Q. What flexibility is in the wrist and fingers?

A. About seventy-five per cent. The fingers are better than that.

Q. She has given her age as fifty-seven, now, Doctor, considering the arthritic condition, do you think that any immobility or lack of mobility would be the result of arthritis?

A. Age isn't always a factor, but arthritis is.

Q. Would you say that her arthritic condition has anything to do with the lack of mobility in the wrist and fingers?

A. Yes.

Q. Would you say if she didn't have arthritis that she would have full mobility in her wrist and fingers?

Mr. Anderson: Objected to as calling for a conclusion. [119]

The Court: He may answer. Overruled.

A. I cannot answer that positively. I think arthritis is a definite factor.

Mr. McCutcheon: That is all.

(Testimony of Doctor C. M. Cline.)

Cross Examination

By Mr. Bowen:

Q. Did this fracture invade the wrist joint?

A. No. When we talk about the wrist joint we talk about the bones in the joint.

Q. What I had in mind, Doctor, was, how close to the end of the radius where it joins the wrist bone was the fracture? A. Very close.

Q. Is it quite possible that the fracture did injure the wrist joint?

A. There is no evidence of damage to the wrist bones.

Q. Isn't it true that frequently where you have a fracture so close to the joint that a thickening of the synovial membrane causes stiffness of the joint? A. Very often.

Q. Could that happen in this instance.

A. This is an arthritic type and not a fracture type.

Q. What is the fact, based upon your experience, whether a fracture of that type is painful or not? A. Very painful.

Q. Do you have as complete a recovery in a person fifty-six years of age, in a fracture of this kind as you would in a younger person? [120]

A. Age is a very peculiar thing. Sometimes people of sixty-five recover better than a person of twenty-five. On an average, however, I would say no.

Q. In a case of this kind in a person of Mrs.

(Testimony of Doctor C. M. Cline.)

Lamberson's age, what is the fact as to whether atrophy occurs and muscles never come back to their normal condition?

A. Age is not always a factor, as I have said before.

Q. Arthritis is caused from a legion of causes, isn't it, Doctor Cline?

A. Usually from some type of potent infection. Some types we cannot determine the cause.

Q. This condition existing in Mrs. Lamberson's wrist, isn't it possible that this injury led to all this trouble?

A. I would say that if she had prior arthritis, that this injury might create a more severe condition.

Q. Is it true that one could have a fracture and an arthritic condition follow that they had never had before?

A. Yes, I think that is pretty far-fetched, but I think anything could happen and be true in connection with a fracture.

Q. If Mrs. Lamberson never had any pain or suffering from pain until after this fracture, isn't it your opinion that the fracture would be the inciting cause of her pain?

A. Yes. I questioned her however, and she did give some prior history of arthritis.

Q. Did she tell you what portion of her body she had pain in? [121]

A. Mostly in her hands.

Q. Is arthritis ever caused from hard work?

(Testimony of Doctor C. M. Cline.)

A. Not that I ever heard of.

Q. Isn't it true that you frequently have people tell you that they don't feel good until they get warmed up and then their pain leaves?

A. Yes, but that is not arthritis.

Q. What kind of a disease is that?

A. Arthritis is definitely a disease of the joints.

Q. Thickening of the joint; of membrane would cause pain and cause loss of mobility?

A. Yes, sir.

Q. Does that examination which you made show that she gave a history of arthritis?

A. Continuous pain, or continues to have pain in the right upper and some arthritic changes in the bones of the hands.

Q. Nothing that she told your about arthritis?

A. Yes, that is a question of my memory.

Mr. Bowen: I think that's all.

Redirect Examination

By Mr. McCutcheon:

Q. Doctor, you are now examining defendant's exhibit 4, I will ask you to state what it is?

A. X-ray picture taken of Mrs. Lamberson by my X-ray technician.

Q. When was that taken? [122]

A. June 24, 1942.

Mr. McCutcheon: We offer it in evidence.

Mr. Bowen: No objection.

The Court: Admitted.

Q. Doctor Cline, if a person is in a fainting con-

(Testimony of Doctor C. M. Cline.)

dition and has fainted, is it possible that involuntary urination or a discharge of urine might occur?

A. Yes sir.

Mr. McCutcheon: That is all.

Recross Examination

By Mr. Bowen:

Q. Do you know where the X-ray is that was taken on the day the injury occurred?

A. I imagine Doctor Soderquist has it. Pictures taken for Doctor Soderquist remain in his charge.

Mr. Bowen: That is all, Doctor.

The Court: As I understand it, Doctor, your examination of June 24th showed that this lady had sustained a definite fracture?

A. Yes sir.

The Court: In the bone of the forearm close to the wrist bone?

A. Yes sir.

The Court: That is all.

Mr. McCutcheon: That is all. [123]

G. W. MILLER

being called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McCutcheon:

Q. Please state your name?

A. G. W. Miller.

(Testimony of G. W. Miller.)

Q. Where do you reside? A. Idaho Falls.

Q. When did you come to Idaho Falls?

A. The latter part of August 1941.

Q. Since that time what has been your occupation?

A. Store manager for Montgomery Ward and Company.

Q. You were such manager about the 26th of November 1941? A. Yes sir.

Q. On that day was your attention directed to the plaintiff, Mrs. Lamberson? A. Yes sir.

Q. About what time of day was your attention directed to her?

A. I cannot remember but I know it was sometime in the afternoon of that day.

Q. How was your attention called to Mrs. Lamberson?

A. Someone phoned me and told me that there had been a lady injured and that I better come down.

Q. In response to that, what did you do? [124]

A. I went down and I believe that Mr. Peterson was with Mrs. Lamberson about the center of the floor in the aisle.

Q. In what department was that?

A. The men's department.

Q. That is on the first floor?

A. Yes, the main floor.

Q. Who else was present at that time?

A. At the moment I don't think anyone else was present.

(Testimony of G. W. Miller.)

Q. Just Mr. Peterson.

A. Just Mr. Peterson was with her at that time, I believe.

Q. Did you have a conversation with her?

A. Yes sir, I asked where she had fallen, and if she was injured. I believe that the first thing she said at that time was that she was very faint and I immediately tried to get a stool for her to sit down. I offered to have her sit down right there rather than move any further. Then I asked her about the injury to her arm.

Q. What did you ask her?

A. She thought it was broken. Of course, the wrist was swollen, as far as I could see it was only slightly swollen, that's the way it seemed to me, and it didn't appear to me personally, although I haven't viewed many broken arms, that it was broken at that time. She was weak and she was excited or excitable, and it was better to remain quiet. She sat down on a small stool there in the aisle. I don't [125] remember just what happened at that time.

Q. Did you inquire how she happened to sustain this injury?

A. I don't remember whether I did or not.

Q. And of course, you don't remember whether she made any reply as to that?

A. No sir, I don't.

Q. After she sat on the stool there in the aisle, what occurred?

A. I got Mrs. Williams and Mrs. Merrill to as-

(Testimony of G. W. Miller.)

sist Mr. Peterson, I think we said that we would call the Doctor immediately. Mrs. Lamberson was asking for a glass of water and one of the girls went after the water. I thought that if Mrs. Lamberson would sit there for a moment that we could get a Doctor. I know I was interested in getting a Doctor. I don't remember whether I left and turned her to Mr. Peterson and Mrs. Williams or not, but I know they remained with Mrs. Lamberson. I don't just remember or know what happened after that, what I did or anything about it.

Q. Was she removed from the place she occupied there?

A. Yes sir, by Mr. Peterson and Mrs. Williams to a more comfortable position as soon as she regained her consciousness. I detailed someone to get the Doctor but we couldn't locate him.

Q. Were you there until she left the store later on?

A. No sir.

Q. Were you around the store? [126]

A. Yes sir.

Q. Was she conscious during the time you were in her presence?

A. Yes sir.

Q. So that you were not present when she fainted as she has testified.

A. No sir.

Q. Subsequent to that time what did you do relative to examining the premises?

A. Well,—

Q. I mean particularly at the entrance.

A. Mrs. Lamberson had left the store when I went and got one of my assistants, Mr. Molen, and

(Testimony of G. W. Miller.)

I asked Mr. Molen to accompany me to the vestibule to see the condition of the place where she claimed she fell. I also got another man, Mr. Tracy, who picked up Mrs. Lamberson. We examined the vestibule and it was perfectly dry as far as the vestibule was concerned, but the sidewalk was wet, it was thawing. We had our janitor clean off the sidewalk several times, using a broom.

Q. Was there any snow on the sidewalk?

A. No snow visible except in one place, a small patch around the corner of the window where Mrs. Lamberson fell, that had fallen off the eaves. It was a new patch of snow, probably one foot square and no one had stepped in it, we noticed that particularly.

Q. Had this splashed in to the vestibule? [127]

A. No sir, it was south of the vestibule.

Q. How far south?

A. A good two feet. We have a small box built over the awning to protect the awning when it is rolled up. That box had the snow on and when it thawed that snow fell off. We had our man out to clean off the sidewalk several times that day.

Q. Sweeping it off with a broom?

A. Yes sir, when the snow melted.

Q. That was Mr. Tracy? A. Yes sir.

Q. Where is Mr. Tracy now?

A. In the air corps, I think he is at Blackville, Arkansas.

Q. Did you make an effort to get him here?

A. Yes sir, but we couldn't locate him until a

(Testimony of G. W. Miller.)

few days ago and his commander will not allow him to leave camp.

Q. How many entrances are there to the store on Shoup Avenue? A. Four.

Q. Calling these from the entrance to the north, what is the first, what department?

A. That is in to the Farm store.

Q. And the second from the north?

A. The men's department.

Q. That is the third from the south?

A. Yes sir.

Q. There are two entrances south of that?

A. Yes sir. [128]

Q. Which is the most largely or generally used of these various entrances?

A. The first on the south.

Q. That is a short distance from Shoup and B Streets?

A. Not over eight feet from the corner.

Q. What is the relative situation or position of the active business houses on B Street and Shoup Avenue relative to the southwest corner of your store?

A. Of course, we have a large store on the corner, and directly opposite, or "kitty-cornered" is the C. C. Anderson Company store, one of the larger stores of the town, and directly across is the Thompson Department store. The reason that entrance is used so much is that customers come across from C. C. Anderson's store and Thompson's and

(Testimony of G. W. Miller.)

they use that entrance. The others are very little used.

Q. Were you there when Mrs. Lamberson was taken from the store? A. Yes sir.

Q. What did you do relative to assisting her to the taxi? A. Nothing.

Q. It was by your direction that she was taken to the Doctor? A. Yes sir.

Q. It was her desire to be taken to her Doctor?

A. I left that to Mr. Peterson, Mrs. Merrill and Mrs. Williams. The reason for that was—— [129]

Mr. Anderson: We object to what the reason was, any reason he might give.

Q. That is all right. Now, Mr. Miller, what care was used on this day to have the entrance and sidewalk on the west side of the store kept clean and free from snow or water?

A. We have several rules in the store during snow and cold weather. This day being a thawing day our janitor has to keep our sidewalk free of ice and snow. Our ramps coming from the sidewalk in to the store must be clean and dry as possible. Due to the fact there we have very little rise there isn't much of a slope from the door to the sidewalk.

Q. How deep is this vestibule from the sidewalk to the door of the store? A. Seven feet.

Q. What is the rise or difference in elevation from the east edge of the sidewalk to the door?

A. Slightly under one inch.

Q. And how deep did you say it is?

(Testimony of G. W. Miller.)

A. Seven feet.

Q. So that the slope would be $1/7$ of an inch per lineal foot, or less? A. Yes sir.

Q. Of what material is the floor of that vestibule constructed?

A. Rough tile one inch by possibly two inches, rough surface, not glazed. [130]

Q. Is each of these entrances the same material?

A. Yes sir.

Q. Did you ever hear of anyone slipping on either of these entrances before?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, and hearsay.

The Court: Overruled.

Mr. Anderson: Exception please.

A. No sir.

Q. During the time you were there did anyone ever slip on these entrances?

Mr. Anderson: The same objection, incompetent, irrelevant and immaterial, and also hearsay.

The Court: Overruled.

A. No sir.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen:

Q. When you stated that Mrs. Merrill assisted Mrs. Lamberson did you mean Mrs. Elaine Merrill, the lady who testified here? A. Yes sir.

Q. At the time Mrs. Lamberson was injured was there any rubber matting, sand or ashes on this tile?

(Testimony of G. W. Miller.)

A. No sir, it wasn't necessary.

Mr. Anderson: We move that part, "it [131] wasn't necessary" be stricken as not responsive.

The Court: That motion is granted, it may be stricken.

Q. How long was it from the time Mrs. Lamberson was injured until she left the store?

A. I don't think it was over fifteen or twenty minutes. There was a little delay in getting the taxi and getting the Doctor, that was the only delay. I tried to get the Doctor personally and then got someone else to get the Doctor.

Q. Your best judgment would be fifteen or twenty minutes that she was there?

A. Approximately.

Q. Did you, yourself have any other conversation with Mrs. Lamberson other than you stated?

A. Did I have any conversation with her?

Q. Any conversation other than you have stated.

A. I don't remember, except that I asked her about her wrist, and her opinion that it was broken, I know that she said that I said if she could move her fingers it wasn't broken. I don't remember that.

Q. What did she say about her back hurting?

A. Not a thing.

Q. You wouldn't say, Mr. Miller, that she didn't say her back hurt? A. I don't recall it.

Q. What time did the store close that day? [132]

A. Six o'clock.

Q. What time did these men that you mentioned go to look at this place?

(Testimony of G. W. Miller.)

A. At the time she was getting into the taxi.

Q. Will you tell us how often you have the vestibule cleaned and washed?

A. Clean them the first thing when we open in the morning.

Q. Daily? A. Yes sir.

Q. In the stormy weather?

A. In stormy weather twice or three times or however necessary it is during the day.

Q. Do you recall the kind of day it was the day Mrs. Lamberson was injured?

A. I don't recall it exactly but it was thawing.
Mr. Bowen: That's all.

Redirect Examination

By Mr. McCutcheon:

Q. How are these entrances cleaned?

A. When I first went to the store I hadn't been in Idaho for twelve years. I had lived here twelve years ago, but I had been in California for ten years. Not having been in any extreme cold weather I didn't know very much about the treatment of windows and so on in that kind of weather, so the first cold snap gave me an education. I let the man [133] wash the windows on the inside and they remained frosted, not only one day but for several days. That taught me not to wash the windows during the cold weather, and we cleaned our sidewalks and ramps off every morning with salt. We never used any water in the cold weather, and it was cold weather at that time. We never used any

(Testimony of G. W. Miller.)

water, we always have our men clean the windows with just rags after the first freeze, and we use salt on the sidewalk and ramps.

Q. What would you say about your directions having been complied with as to the cleaning of the vestibules and the ramps?

Mr. Anderson: Objected to as calling for a conclusion.

The Court: He may answer if he knows.

Q. Did they obey your instructions?

A. I think they conscientiously did because we were afraid of the ice that forms on the sidewalk.

Mr. Anderson: We move to strike that as a conclusion of the witness.

The Court: The latter part may go out as not responsive.

Q. To your knowledge was there water used on that ramp on November 26, 1941 in the afternoon?

A. No sir, there was not.

Q. How soon after *Mr. Lamberson* fell was it that you went out [134] to examine this vestibule or ramp?

A. I don't know exactly but it couldn't have been more than ten or fifteen minutes.

Q. You found it dry? A. Yes sir.

Q. Was there any water at all on the vestibule?

Mr. Anderson: Objected as leading, also it is argumentative. He has answered a very similar question.

The Court: Overruled.

Q. Any water there?

(Testimony of G. W. Miller.)

A. No, sir, none at all.

Mr. McCutcheon: That is all.

Recross Examination

By Mr. Bowen:

Q. You knew that tile was slippery and dangerous if it would become wet? A. No sir.

Q. You had no reason for keeping it dry?

A. Yes sir.

Q. What was that reason?

A. To keep people from tracking water into the store.

Q. People would not slip on it?

A. I defy you to slip on it.

Q. Describe that tile. [135]

A. I said the top was rough.

Q. What is fact as to being level?

A. As level as rough tile can be.

Q. You were not present at the time Mrs. Lamberson fell? A. No sir.

Q. As to whether it was wet at that time you don't know?

A. I viewed it ten or fifteen minutes afterward.

Q. And now will you answer the question?

A. No, I wouldn't know.

Mr. Bowen: That is all.

Mr. McCutcheon: That's all, Mr. Miller.

The Court: This man who had charge of the janitor work is now in the army?

A. Yes sir.

MRS. OUITA WILLIAMS

being called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McCutcheon:

Q. Please state your name?

A. Ouita Williams.

Q. Where do you live, Mrs. Williams?

A. 439 22nd street.

Q. In Idaho Falls? A. Yes sir [136]

Q. Were you there in November 1942?

A. Yes sir.

Q. What was your occupation at that time?

A. Saleslady at Montgomery Ward and Company.

Q. Do you still occupy that position?

A. Yes sir.

Q. I meant to say in November 1941 when I said

42. A. Yes sir, I was there.

Q. Do you remember about November 26, 1941 that you met Mrs. Lamberson one of the plaintiffs in this case.

A. Yes sir.

Q. Where were you at that time?

A. When I first saw her?

Q. Yes.

A. She was sitting on a stool there and I was wondering what was wrong and I went to investigate.

Q. What did you discover?

A. I saw her on the stool and I asked if she was hurt and she said "yes".

(Testimony of Mrs. Ouita Williams.)

Q. Was Mr. Miller there? A. Yes sir.

Q. What instructions did you receive from Mr. Miller, if any?

A. He told me to stay with her.

Q. Did you stay with her? A. Yes sir.

[137]

Q. What was done after you observed her?

A. She called for a drink, and Elaine Merrill went for it. I stayed with her, and then she went to phone, I can't remember now which she did first.

Q. She went to phone and to get a drink?

A. Yes sir.

Q. Was Mrs. Lamberson moved from that position in which you saw her first? A. Yes sir.

Q. Who assisted in that?

A. Mr. Peterson and myself.

Q. Where did you take her?

A. To the shoe department.

Q. How far is that.

A. About from here to the back wall.

Q. About thirty or forty feet.

A. I wouldn't know in feet.

Q. After she was moved to the shoe department what occurred?

A. She almost fainted, kind of sagged. I was on one side and Mr. Peterson on the other. She sank my way and I reached down and tried to hold her up, and we kind of dragged her to the shoe department and laid her on the floor.

Q. She had fainted before you laid her on the floor. A. Yes sir.

(Testimony of Mrs. Ouita Williams.)

Q. How long was she unconscious? [138]

A. Not very long, she came right out of it.

Q. In the meantime Mrs. Merrill had gone for the water to bathe her hands and face with?

A. Yes sir.

Q. Did you administer any first aid?

A. Yes sir.

Q. Did you have occasion to observe the condition of her clothing at that time?

A. Yes sir. I tried to hold her up, I had my arm around her.

Q. Did you notice her stockings?

A. They were not wet then, when we took her to the shoe department.

Q. They were not wet. A. No sir.

Q. After she was laid on the floor what happened relative to her clothing?

A. I asked if she felt better, I asked if she wanted to get up and she said she would and I helped her up and her clothes were wet.

Q. What had happened to her clothing to make them wet? A. She had urinated on her clothes,

Q. While she was unconscious. A. Yes sir.

Q. What was done after you got her on her feet, about relieving her? [139]

A. They called a taxi and took her to the Doctor.

Q. Did you have a conversation with her while she was in your charge?

A. I asked her name and address, and she said

(Testimony of Mrs. Ouita Williams.)

she felt foolish fainting like that, but that she fainted quite easily.

Q. Did she say anything about fainting before?

A. She said she fainted easily.

Q. Did she say anything about how she happened to fall? A. No sir.

Q. Can you remember what the weather was that day? A. No sir.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen.

Q. Are you employed by anyone at this time?

A. Yes sir.

Q. Who.

A. Montgomery Ward and Company.

Q. How long have you been employed by Montgomery Ward and Company?

A. Off and on for between six and seven years.

Q. Continuously? A. No.

Q. But you are in their employ at this time.

A. Yes sir. [140]

Q. How long was Mrs. Lamberson in the store after you first observed her, before she left?

A. About ten or fifteen minutes. I imagine it might have been twenty, I don't know exactly how long.

Q. Where was Mr. Miller when you first observed Mrs. Lamberson? A. He was with her.

Q. Did he remain with her until she left the store?

(Testimony of Mrs. Ouita Williams.)

A. No sir, he told me to watch her.

Q. Mrs. Williams, you paid particular attention to Mrs. Lamberson's stockings that day?

A. No, I didn't see her stockings that day. I didn't pay any attention.

Q. You never observed her stockings at any time she was in the store that day.

A. No, I was too busy.

Q. Tell us how you know that Mrs. Lamberson urinated?

A. Because when I took her to the shoe department she started to sink on my side and when I reached my hands under her I noticed there was nothing wet,—I mean I didn't notice anything in the shoe department.

Q. It might have been there and you not noticed it?

A. No sir, because I took my hand away right quick and caught her elsewhere.

Q. As to that moisture, you don't know what it was?

A. I know that there was no water around. [141]

Q. You stated your own conclusions as to what you thought it was, didn't you?

A. Well, I guess I don't know what it was.

Q. It may have been blood.

A. Blood would be red.

Q. How do you know what it was.

A. If it wasn't that I don't know what it was, no one spilled any water around there.

(Testimony of Mrs. Ouita Williams.)

Q. No water was spilled at any time you administered to her. A. That's right.

Q. It couldn't have been from the water put on her face or from the water that she drank.

A. That's right.

Q. And the answer you gave is the best answer you can give. A. That's right.

Mr. Bowen: I think that's all.

Redirect Examination

By Mr. McCutcheon.

Q. It was below her waist.

A. Yes sir, I reached under her thigh, and put my hand up high.

Q. And had you had your hand down there when you first moved her to the shoe department?

A. Yes sir.

Q. And what was the condition of her garments at that time? [142] A. My hands were dry.

Q. It was not wet at all until after she fainted and lay on the floor? A. That's right.

Mr. McCutcheon: That is all.

Mr. Bowen: That's all.

CECIL D. PETERSON

Being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McCutcheon.

Q. Please state your name?

A. Cecil D. Peterson.

Q. Where do you reside?

A. Now I reside in Weiser, Idaho.

Q. Where were you living in November 1942,
—November 26th.

A. You mean 1941.

Q. Yes.

A. 427 F street, Idaho Falls.

Q. What was your occupation then?

A. Charge of the men's clothing department in
Montgomery Ward and Company store.

Q. You are still working for Montgomery Ward
and Company?

A. Yes sir.

Q. In the Weiser store.

A. Yes sir. [143]

Q. On that day, November 26, 1941 you were on
duty at the store, were you?

A. Yes sir.

Q. Did you have occasion to see Mrs. Lamberson?

A. Yes sir.

Q. What time of day was that?

A. Sometime in the afternoon, between three
and four.

Q. What was it that directed your attention to
her?

A. Mr. Tracy brought her from the front of the
store, got her to the Shoe department and Mr. Miller
called me over to take care of Mrs. Lamberson.

(Testimony of Cecil D. Peterson.)

Q. Did you know her before that time?

A. No sir.

Q. What did you do at that time?

A. I stayed with her until the two girls came and then I went and called a taxi.

Q. Did you have a conversation with her prior to the time the ladies came? A. No sir.

Q. Can you recall the condition of the weather?

A. It was quite sunny. It was melting on the sunny side of the buildings.

Q. Which way does that store face?

A. West.

Q. And would that be the sunny side? [144]

A. In the afternoon.

Q. Did you make any examination of the vestibule and the ramp that day?

A. No sir, I was busy taking her to the Doctor.

Q. What did you do to give her help?

A. We got her to the shoe department and as soon as we revived her I called a taxi and took her to the back door and took her up to the Doctor's office.

Q. You assisted her out of the back door to the taxi?

A. Yes sir, and up to the Doctor's office.

Q. Did you observe, when you first took charge of her, the condition of her garments?

A. No sir, I did not.

Q. How long was she in the store after you left her and went to call a taxi?

A. Wasn't over fifteen minutes, I don't think.

(Testimony of Cecil D. Peterson.)

Q. Who was with you when you and Mrs. Lamberson walked out to the rear entrance to get into the taxi?

A. One of the girls either Mrs. Merrill or Mrs. Williams.

Q. You don't recall which?

A. No sir, I don't.

Q. Did you have any conversation with Mrs. Lamberson until you got her to Doctor Soderquist's office?

A. Yes sir, a few moments.

Q. Where was that? [145]

A. In the taxi and in the shoe department as I was there with her, two ladies passed and smiled and said "you are up to your old tricks again" and left.

Q. At that time and place and occasion did you make any inquiry as to how she had fallen?

A. I didn't, no, but she told me that she fell before.

Q. What did she say relative to having fallen before?

A. She said she didn't know how she fell, but it happened once before at a basket ball game.

Q. Did she say anything about her fainting spells, being subject to fainting spells?

A. No sir.

Q. You took her to the Doctor's office.

A. Yes sir. I called her husband and they said they would get in touch with him where he was working.

Q. Did you know the ladies who made this remark you stated?

(Testimony of Cecil D. Peterson.)

A. No sir, I have seen them around town but I wasn't acquainted with them.

Q. Did Mrs. Lamberson make any reply to their remark?

A. No sir, she was too weak, she didn't feel much like talking.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen.

Q. When these two ladies passed and made the remark, was that while she was in the fainting condition? [146]

A. No. While I was taking her to the taxi, she was hanging on to my shoulder.

Q. The taxi was in the alley. A. Yes sir.

Q. Was that where this conversation took place.

A. No sir, in the shoe department, that arch-way to the ladies side, they had come around the corner of the ladies side, that is where they seen her.

Q. You don't know those ladies?

A. No sir.

Q. Did Mrs. Lamberson tell you when it was that she fell at a basket ball game?

A. No sir, she said she fell at a basket ball game.

Q. You don't know how many years before it was, or anything about it. A. No sir, I don't.

Q. That is all she told you. A. Yes sir.

Mr. Bowen: That's all.

Mr. McCutcheon: Yes, that's all.

The Court: We will take a ten minute recess.

3:05 P. M. October 15, 1942

G. W. MILLER,

Being recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

[147]

Direct Examination

By Mr. McCutcheon:

Q. Mr. Miller, who inspected the entrance-way and the ramp with you on that day.

A. Mr. Molen.

Q. Was he an employee of yours at that time.

A. Yes sir.

Q. Where is he now.

A. He is a civilian employee of the air corps.

Q. How long have you been in the merchandising business for Montgomery Ward and Company.

A. Eleven years.

Q. How many stores have you acted as manager of?

A. Five.

Q. With respect to the floor or ramps or the vestibule on these entrances, what is the practice of the Company about the construction of similar floors of passage-ways in all of their stores?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. The floors that we have there has been constructed by the construction department, I don't mean in all of the stores, but at least seventy or eighty per cent of the stores, they have this same ramp. [148]

(Testimony of G. W. Miller.)

Q. Of tile set together with cement.

A. Yes sir.

Q. Do you know of anything that you might have done, or which was omitted, to provide ordinary care for the safety of your customers.

Mr. Anderson: Objected to as that is a question for the court.

The Court: Overruled.

A. Well, no, I don't know of anything that was omitted. We have printed safety rules——

Mr. Anderson: We object to what they have printed, that is self serving.

The Court: It is not responsive.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen:

Q. What is ordinary care?

A. That is to say that we look out for the people we are serving, enticing into our store, to see that they are well served for their safety so that they won't get injured in the store, no oil on the floors, seeing that the aisles are clear, and that the doorways are working perfectly.

Mr. Bowen: That is all.

Redirect Examination

By Mr. McCutcheon: [149]

Q. Those conditions prevailed in the store on the afternoon of November 26, 1941?

(Testimony of G. W. Miller.)

A. To the best of my ability, I would say yes, they did.

Mr. McCutcheon: That's all. We rest.

MR. CHESTER A. LAMBERSON

Recalled in rebuttal as a witness on the part of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Directing your attention to June 24, 1942 when you went up and was examined by Doctor Cline, what is the fact as to whether or not you told him anything about having an arthritic condition, or arthritis? A. I never told him anything.

Q. Directing your attention to the time that you were in the shoe department after you had been injured do you recall two ladies passing by and one of them saying to you "you are up to your old tricks again"?

A. No I don't remember that.

Q. Did that occur?

A. No sir, I passed one lady I knew but she didn't say that.

Q. Was anything in substance or effect like that said to you? A. No sir.

Q. Directing your attention to the time you were riding over [150] from Montgomery Ward's to Doctor Soderquist's office with Mr. Peterson, what is

(Testimony of *Mr. Chester A. Lamberson.*)

the fact as to whether you told him that you had fallen or fainted at a basket ball game?

A. I never told him I had fainted.

Q. What is the fact as to whether you told Mrs. Williams who testified here that you said you fainted easily, did you tell her that?

A. I don't recall it.

Q. Mrs. Lamberson, after you had fainted and got on your feet again, what is the fact as to whether or not you urinated after you had been injured, or at any time while you were at Montgomery Ward and Company store from the time you were hurt until you left the store?

Mr. McCutcheon: Objected to because the occurrence happened when she was unconscious.

The Court: She may answer to the best of her ability.

A. I never did.

Mr. Bowen: That is all.

Mr. McCutcheon: No questions.

Mr. Bowen: We rest.

Mr. McCutcheon: We have no surrebuttal.

(Duly Verified.)

[Endorsed]: Filed January 28, 1943. [151]

[Title of Court and Cause.]

MOTION FOR THE ASSOCIATION
OF ADDITIONAL ATTORNEYS FOR
DEFENDANT:

Comes now the defendant, Montgomery Ward and Company, a corporation, by its attorney of record, Otto E. McCutcheon, and moves the Court that an order be made herein for the association and entering of W. B. Powell, 2825 East 14th Street, Oakland, California, and W. L. Schoener of 2825 East 14th Street, Oakland, California, attorneys for the defendant.

MONTGOMERY WARD AND
COMPANY,

By OTTO E. McCUTCHEON
Its attorney of record.

It is so ordered;

Feb. 2nd, 1943

LLOYD L. BLACK
District Judge.

[Endorsed]: Filed February 2, 1943. [153]

[Title of Court and Cause.]

ORDER AS TO DEFENDANT'S
EXHIBIT NO. 4.

The defendant in the above entitled cause having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made

and entered herein, and it appearing to the Court that defendant's Exhibit No. 4 consists of a negative of an x-ray picture described at page 62 of the reporter's transcript and admitted in evidence as ordered at page 63 of said transcript, should be inspected by the appellate court and sent to the appellate court in lieu of copies thereof.

It Is Hereby Ordered that the original defendant's Exhibit No. 4 be sent to the appellate court in lieu of copies thereof, to be by such court held for inspection and used on the appeal taken by the appellant; and it is further ordered that upon completion of the use thereof by the appellate court that the same be returned to this court.

Dated at Boise, Idaho, February 20, 1943.

L. B. SCHWELLENBACH

Acting District Judge.

[Endorsed]: Filed February 24, 1943. [154]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Comes now the defendant-appellant, Montgomery Ward and Company, a corporation, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

The complete record and all the proceedings and evidence in the action, including:

1. The complaint.
2. The motions and notice to dismiss the action, etc.
3. Order of the Judge ruling on motions dated July 7th, 1942.
4. Bill of particulars.
5. Stipulation extending time to answer.
6. Answer.
7. Opinion dated October 20, 1942, by Judge Healy.
8. Findings of fact and conclusions of law.
9. Notice of application to have costs and disbursements taxed, and memorandum of costs and disbursements.
10. Notice of motion for stay of proceedings.
11. Motion for stay of proceedings to give time to file notice and motion for new trial, dated October 28th, 1942.
12. Judgment dated October 28th, 1942.
13. Order granting stay of execution.
14. Bond on stay of execution executed by United States Fidelity and Guaranty Company October 30th, 1942.
15. Motion for new trial, with all affidavits attached.
16. Notice of motion calling for hearing motion for new trial, dated December 23rd, 1942.
17. Order denying motion for new trial dated January 29th, 1943, and signed by Judge Healy. [155]

18. Notice of appeal dated January 22nd, 1943.
19. Cost bond on appeal with certified copy of power of attorney attached.
20. Petition for approval of supersedeas and stay on appeal.
21. Order approving bond and granting a stay of execution.
22. Supersedeas bond with certified copy of power of attorney attached and signature of Judge Black approving bond as to sufficiency, form, and surety, and allowing the same as a supersedeas.
23. All court minutes relating to case.
24. All entries on "Civil Docket" of said court relating to said cause and particularly date of entry of judgment and date of filing notice of appeal.
25. Statement of points on which defendant-appellant intends to rely on appeal as styled in the District Court.
26. Transcript of all testimony taken at the trial of which two copies thereof heretofore have been filed with the Clerk of the Court by the Reporter.
27. Motion for the association of additional attorneys for defendant and order granting motion.
28. Application for order dispensing with printing defendant-appellant's Exhibit No. 4.
29. Affidavit accompanying application listed as No. 28 aforesaid.

30. Order as to original exhibits.

No. 26 is all testimony taken at the trial, the same being contained in the Reporter's transcript, two copies of which heretofore have been filed with the Clerk of this Court; and

31. The last item, being this paragraph No. 31, being this Designation of Contents of Record Proceedings and evidence on appeal, and proof of service.

32. The order designating Judge William Healy to try the case. [156]

33. The order designating Judge Black to act as District Judge in this District of Idaho.

Respectfully submitted,

W. B. POWELL

2825 East 14th Street,
Oakland, California

W. L. SCHOENER

2825 East 14th Street,
Oakland, California

OTTO E. McCUTCHEON

208 Salisbury Building,
Idaho Falls, Idaho.

Attorneys for Defendant-Appellant.

Service of a copy of the foregoing Designation of Contents of Record on Appeal admitted this 16th day of February, 1943.

CLYDE BOWEN

First Security Bank Building,
Pocatello, Idaho.

W. H. ANDERSON

Pocatello, Idaho.

WM. S. HOLDEN

American National Bank

Building

Idaho Falls, Idaho.

Attorneys for Plaintiffs-Appellees.

[Endorsed]: Filed Feb. 18, 1943. [157]

ORDER DESIGNATING UNITED STATES
DISTRICT JUDGE PURSUANT TO R. S.
Sec. 591 (28 U.S.C.A. Sec. 17)

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of section 591 of the Revised Statutes of the United States (28 U.S.C.A. Sec. 17), do hereby designate and appoint the Honorable William Healy, United States Circuit Judge, for the Ninth Judicial Circuit, to hold the District Court of the United States for the District of Idaho, from October 4, 1942, to and including November 4, 1942 and to have and exercise within said District the same powers that are vested in the judge thereof.

Dated, San Francisco, California, this 18th day of August, 1942.

CURTIS D. WILBUR

Senior United States Circuit
Judge for the Ninth Judicial Circuit.

[Endorsed]: Filed August 24, 1942. [158]

ORDER DESIGNATING UNITED STATES
DISTRICT JUDGE PURSUANT TO R. S.
Sec. 591 (28 U.S.C.A. Sec. 17)

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of section 591 of the Revised Statutes of the United States (28 U.S.C.A. Sec. 17), do hereby designate and appoint the Honorable William Healy, United States Circuit Judge, for the Ninth Circuit, to hold the District Court of the United States for the District of Idaho, to hear the case of *Chester Lamberson v. Montgomery Ward & Co.*, from December 21, 1942, to the completion of the case, and to have and exercise within said District the same powers that are vested in the judge thereof.

Dated, San Francisco, California, this 21st day of December, 1942.

CURTIS D. WILBUR

Senior United States Circuit
Judge for the Ninth Judicial Circuit.

[Endorsed]: Filed December 26, 1942. [159]

ORDER DESIGNATING UNITED STATES
DISTRICT JUDGE PURSUANT TO R. S.
Sec. 591 (28 U.S.C.A. Sec. 17)

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of section 591 of the Revised Statutes of the United States (28

U.S.C.A. Sec. 17), do hereby designate and appoint the Honorable Lloyd L. Black, United States District Judge, for the Western District of Washington, to hold the District Court of the United States for the District of Idaho, from February 1, 1943, to and including February 15, 1943 and to have and exercise within said District the same powers that are vested in the judge thereof.

Dated, San Francisco, California, this 18th day of January, 1943.

FRANCIS A. GARRECHT

Acting Senior United States
Circuit Judge for the Ninth
Judicial Circuit.

[Endorsed]: Filed January 21, 1943. [160]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 160, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the

United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$37.55, and that the same have been paid in full by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 24th day of February, 1943.

[Seal]

W. D. McREYNOLDS
Clerk.

[Endorsed]: No. 10378. United States Circuit Court of Appeals for the Ninth Circuit. Montgomery Ward and Company, a corporation, Appellant, vs. Chester A. Lamberson and Lydia Lamberson, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed February 26, 1943.

PAUL P. O'BRIEN

Clerk of the United States
Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10378

MONTGOMERY WARD AND COMPANY, a
corporation,

Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA LAM-
BERSON,

Appellees.

APPLICATION FOR ORDER DISPENSING
WITH PRINTING APPELLANT'S EX-
HIBIT No. 4.

To the Honorable Judges of the Ninth United
States Circuit Court of Appeals:

The petition of Montgomery Ward and Company,
a corporation, Appellant, respectfully shows:

That an appeal has been perfected by your pe-
titioner to this Court from the judgment rendered
in the United States District Court for the District
of Idaho, Eastern Division, in a suit wherein Ches-
ter A. Lamberson and Lydia Lamberson were plain-
tiffs and your petitioner was the defendant, as more
fully appears from the affidavit of Otto E. Mc-
Cutcheon hereunto attached and made a part here-
of.

Also as appears from said affidavit several ex-
hibits were received in evidence, one of which was
numbered Defendant's Exhibit No. 4 which is not

of a printable type, the same being an x-ray photographic negative of the bones of the forearm, wrist, and hand of a human being, the circumstances of its unprintability and the grounds for this motion appearing more particularly in the annexed affidavit.

Wherefore, your petitioner prays that an order be made and entered herein dispensing with the printing of the said exhibit, the original of which will be forwarded by the Clerk of the District Court in due course of appeal.

MONTGOMERY WARD

AND COMPANY,

By OTTO McCUTCHEON

Attorney for Appellant.

So ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

On reading and filing the foregoing petition and the accompanying affidavit, it is ordered that said Exhibit No. 4 be not printed.

.....

United States Circuit Judge.

State of Idaho,

County of Bonneville—ss.

Otto E. McCutcheon being first duly sworn deposes and says:

That he is one of the attorneys for Montgomery Ward and Company, a corporation, appellant herein, and makes this affidavit on behalf of said appellant for the purpose of securing an order dispensing with the printing of one exhibit in this case, the

same being defendant's Exhibit No. 4, so marked for identification in the lower court.

That judgment was rendered herein in favor of the plaintiffs and against the defendant on October 28th, 1942, and that on January 22nd, 1943, the defendant perfected an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, by filing an original and copies of notice of appeal and undertaking on appeal and undertaking for costs, and has since served and filed the additional papers required by the Rules of Court.

That on the 2d day of February, 1943, Judge Black, acting District Judge, in the District of Idaho, made an order for the original of the said Exhibit No. 4 to be forwarded to this Court with the record on appeal. That said Exhibit is not of a printable type because it is an x-ray photographic negative of the bones of the forearm, wrist and hand of a human being, and to show the purpose for which said exhibit was admitted in evidence the negative itself should be examined by the Court.

OTTO McCUTCHEON

Subscribed and sworn to before me this 26 day of February, 1943.

LOUISE KEEFER

Notary Public.

[Seal]

Residing at Idaho Falls, Ida.

[Endorsed]: Filed Mar 2, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH THE
APPELLANT, MONTGOMERY WARD
AND COMPANY, INTENDS TO RELY ON
APPEAL AND DESIGNATION OF REC-
ORD TO BE PRINTED.

Comes now the Appellant, Montgomery Ward and Company, a corporation, by its attorneys herein, and respectfully represents to this Honorable Court that in the above styled and numbered cause it intends to rely upon the following statement of points on appeal:

1

That the Court erred in denying the motion of the defendant for an order requiring plaintiffs to make a more definite statement of their alleged cause of action referred to in defendant's motion as paragraph Second and sub-paragraphs (a) and (b) for the reason that the said complaint was uncertain, ambiguous and indefinite in the particulars described in the said sub-paragraphs of paragraph Second and each of them.

2

(1) The Court erred in finding that the defendant was negligent in allowing water to be and remain upon the ramp or entrance way without any sand or ashes or matting to cover the same;

(2) The Court erred in finding that at the time of plaintiff's injury the ramp or entrance way was under the exclusive control of the defendant;

(3) The Court erred in finding that the plaintiff Lydia Lamberson fell upon the ramp or entrance way as a proximate cause of the same being wet, and further that the same was wet due to defendant's negligence and the absence of ashes or sand or matting upon said ramp;

(4) The Court erred in finding that the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over said ramp or entrance way and in her use thereof for egress from the store;

(5) The Court erred in finding that the defendant did not give plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance way prior to or at the time of her passing out and over the same;

(6) The Court erred in finding that the said ramp or entrance way was unsafe for patrons and persons using same because there were no ashes, sand or matting thereon;

(7) The Court erred in admitting the testimony of Lydia Webb Theusen and Ethel Criddle regarding the presence of water on the ramp in question for the reason that it was not shown that said testimony was related to the time of the accident.

3

That the evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, or at all, for which reason the Court erred in making and entering its findings of fact, and conclusions of law and judgment in favor of the plaintiffs.

4

That under the proofs submitted the only lawful judgment which could or should have been entered in said cause was a judgment in favor of the defendant and against the plaintiffs.

That the reasons for the foregoing Statement of Points are set forth as follows:

a. There was no proof that defendant had knowledge of the presence of water on the ramp or floor of the store entrance upon which plaintiff, Lydia Lamberson, alleged that she fell.

b. There was no proof that there was water present on the ramp or floor of the entrance for a sufficient length of time prior to the alleged fall of the plaintiff, Lydia Lamberson, to give or charge defendant with constructive notice thereof.

c. The proof affirmatively shows that the presence of water on the ramp or floor of the entrance to the store as alleged by plaintiffs to have been present, was visible and obvious to the plaintiff Lydia Lamberson as she left said store, and thus she had full knowledge thereof.

d. There was proof that plaintiff Lydia Lamberson was contributorily negligent in disregarding the dangers of an obvious condition of which she had knowledge and the defendant had none, and further that said plaintiff assumed any risk incident to her use of the ramp by stepping into a spot of water which she alleges was on said ramp or floor at the moment of her use.

e. That the defendant was not an insurer of the

safety of the plaintiff Lydia Lamberson as an invitee.

5

That the Court erred in awarding to the plaintiffs a lump sum of money for general damages without specifying what portion of the damages awarded was for permanent injuries alleged to have been sustained by the plaintiffs.

Appellant respectfully represents to the Court that in the foregoing statement of points the Appellant, Montgomery Ward and Company, is designated as the defendant, and the Appelles, Chester A. Lamberson and Lydia Lamberson, are designated as the plaintiffs.

Respectfully submitted, etc.

DESIGNATION OF RECORD TO BE PRINTED

Now comes the defendant-appellant, Montgomery Ward and Company, a corporation, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on the appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit as follows:

The complete record certified to the Circuit Court of Appeals by the Clerk of the District Court including all the proceedings and evidence in the action and also including the following papers and documents filed in the Circuit Court of Appeals:

1. The petition and supporting affidavit dispensing with the printing of defendant-appellant's Ex-

hibit No. 4, and the order to be made and entered thereon.

2. The foregoing statement of points to be relied upon by the appellant on appeal.

3. The designation of the contents of the printed record on appeal as specified on this sheet aforesaid.

4. Proof of service hereof on attorneys for appellees.

Respectfully submitted,

W. B. POWELL

Residence: 2825 East 14th
Street, Oakland, California.

W. L. SCHOENER

Residence: 2825 East 14th
Street, Oakland, California.

OTTO McCUTCHEON

Residence: Idaho Falls, Ida.
Attorneys for Appellant.

Receipt of a copy of the foregoing Statement of Points to be relied on by appellant on appeal and designation of record to be printed admitted February 26th, 1943.

WILLIAM S. HOLDEN

CLYDE BOWEN

WALTER H. ANDERSON

Attorneys for Appellees.

[Endorsed]: Filed Mar. 2, 1943. Paul P. O'Brien, Clerk.

